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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 175.

HERBERT J. FLEMING, JOHN A. FLEMING, SEARHOPE
FLEMING, ET AL., ETC., ET AL., PLAINTIFFS IN
ERROR.

ANNA B. FLEMING

APPEAL TO THE SUPREME COURT OF THE STATE OF IOWA

THE UNIVERSITY OF CHICAGO

IN THE DEPARTMENT OF

PHYSICS

1963-64

(29,305)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 175.

ROBERT J. FLEMING, JOHN A. FLEMING, STANHOPE
FLEMING, ET AL., ETC., ET AL., PLAINTIFFS IN
ERROR,

vs.

ANNA B. FLEMING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

	Original.	Print.
Proceedings in the supreme court of Iowa.....	1	1
Stipulation as to transcript of record.....	1	1
Appellants' abstract of record.....	3	2
Petition in equity.....	5	2
Exhibits 101, 102, and 103 to Petition—Contracts be- tween the Fleming Brothers.....	8	4
Answer	15	8
Reply	21	12
Testimony of Mrs. Anna B. Fleming.....	26	13
Exhibit to Testimony of Mrs. Fleming—Petition of Anna B. Fleming et al. for letters of administration.	44	19
Exhibit to Testimony of Mrs. Fleming—Inventory of estate of Charles Fleming, deceased.....	54	22
Stipulations	59	24
Testimony of Miss Addie E. End.....	62	26
Testimony of Robert J. Fleming.....	79	33

Exhibit 104 to Testimony of Robert J. Fleming—Summary of contract between Mass. Mutual Life Ins. Co. and the Fleming Brothers.....	88	34
Exhibit 110 to Testimony of Robert J. Fleming—List of stock certificates of Fleming Brothers, Inc.....	98	39
Exhibit 111 to Testimony of Robert J. Fleming—Endorsement on envelope.....	100	40
Testimony of Miss Katharine D. Ives.....	105	41
Miss Addie E. End (recalled).....	108	42
John A. Fleming.....	112	43
Stanhope Fleming.....	124	45
Decree	136	48
Notice of appeal.....	140	50
Appellee's amendment to abstract.....	141	50
Opinion, Dudley, J.....	142	50
Appellants' brief and argument.....	165	62
Appellee's brief and argument.....	175	67
Appellee's reply.....	191	75
Appellants' petition for rehearing.....	198	78
Appellee's opposition to petition for rehearing.....	208	80
Appellants' second petition for rehearing.....	218	81
Appellants' third petition for rehearing.....	226	85
Submission of cause.....	230	86
Judgment	231	87
Opinion, Gaynor, J.....	233	87
Dissenting opinion, Salinger, J.....	240	100
Submission of cause on petition for rehearing.....	247	111
Judgment on rehearing.....	248	111
Opinion on rehearing, Evans, J.....	250	112
Dissenting opinion on rehearing, Salinger, J.....	252	116
Submission of cause on second petition for rehearing.....	259	126
Judgment on second rehearing.....	260	127
Opinion on second rehearing, Evans, J.....	262	127
Submission of cause on third petition for rehearing.....	265	130
Order overruling third petition for rehearing.....	266	131
Petition for writ of error.....	267	131
Writ of error.....	280	139
Prayer for reversal.....	282	140
Assignment of errors.....	284	141
Order for transcript.....	309	154
Order allowing writ of error.....	310	155
Bond on writ of error.....	311	155
Citation and service.....	315	157
Clerk's certificate.....	317	158

[File endorsement omitted.]

IN THE SUPREME COURT OF IOWA

In Equity.

ANNA B. FLEMING, Plaintiff, Appellee and Defendant in Error,

vs.

ROBERT J. FLEMING, JOHN A. FLEMING, STANHOPE FLEMING, Fleming Bros., a Partnership, and John A. Fleming, Administrator of the Estate of Charles Fleming, Deceased, Defendants, Appellants and Petitioners in Error.

STIPULATION

[Filed Dec. 16, 1922.]

It is hereby stipulated and agreed by and between the parties to the above entitled cause:

1. That the record in said cause which shall be submitted to the Supreme Court of the United States, and upon which said court is to decide the cause, is the record which shall be certified by the Clerk of the Supreme Court of Iowa to be such record.

For the purpose of simplyfying and reducing the volume of the record and making review by the Supreme Court of the United States easier by means of eliminating all matters that are immaterial and of no aid to such review, it is further stipulated that said record to be so certified, submitted and acted upon by the court, shall and is hereby made to consist of the following words, figures and matters, to-wit:

2. It is further so stipulated and agreed that these appellants now petitioners perfected their appeal from the decree of the District Court of Iowa in proper manner and in due time.

3. It is agreed and stipulated that this cause shall be presented to the Supreme Court of the United States upon the record as herein stipulated, unless said court shall order the amendment, enlargement or reduction thereof.

Dated this 14th day of December, A. D., 1922.

Albert B. Cummins, Clinton L. Nourse,
William E. Miller, Attorney- for said
Defendants, Appellants and Petitioners
in Error. Parsons & Mills, Attorneys
for said Plaintiff, Appellee and De-
fendant in Error.

3 & 4 In the Supreme Court of Iowa, May Term, A. D. 1918.

[Title omitted.]

Appeal from Polk District Court.

Hon. Charles A. Dudley, Judge.

William E. Miller, with whom is Albert B. Cummins, Attorneys
for Appellants.

Parsons & Mills, Attorneys for Appellee.

APPELLANTS' ABSTRACT OF RECORD

[Filed March 2, 1918.]

5 On July 5, A. D. 1916, the plaintiff filed in the office of the
clerk of the District Court of Polk County, Iowa, the fol-
lowing:

PETITION IN EQUITY

Comes now the plaintiff, and for her cause of action states:

1. That on the 2nd day of Jan., 1881, she was married to Charles Fleming, who is now deceased, having died in Polk County, Iowa, on the 15th day of January, 1916, leaving no last will and testament, and no issue, and leaving surviving him the plaintiff herein, his widow, and three brothers, Stanhope Fleming, Robert J. Fleming and John A. Fleming.

2. The defendants herein, the widow, and each of these brothers being residents of Des Moines, Polk County, Iowa.

3. That at the solicitation of said brothers of plaintiff's deceased husband, the plaintiff herein joined in a petition that said John A. Fleming be made administrator of the estate of plaintiff's deceased husband.

4. That the plaintiff herein then learned for the first time that the brothers of her deceased husband claimed to own all of the property of her deceased husband save and except the exempt household goods of an estimated value of Five Hundred Dollars, though in fact, the value of the same is considerable less.

5. That plaintiff's deceased husband and his aforesaid brothers had for all of their business lives been associated together in business, as a partnership, in all of their business transactions, and that they owned all of their property in equal proportions; and that plaintiff's deceased husband died seized of an undivided one-

6 fourth interest of all of the partnership property, subject only to a proportionate share of the partnership debts.

6. That plaintiff's deceased husband carried life insurance in the amount of Fifty-eight Thousand Dollars.

7. That the Fleming Brothers owned a Corporation, known as "The Fleming Brothers, Incorporated," in which the stock was

equally divided among the four brothers, Twenty-five Hundred shares to each, and that among the partnership property, a fourth of which was owned by plaintiff's deceased husband, was a certificate of Twenty-five Hundred Shares of Stock in the Fleming Brothers, Incorporated, in the name of Chas. Fleming; and that said incorporation was effected in the year 1901.

8. That there stood also, in plaintiff's deceased husband's name at the time of his death certain real estate, which is now claimed to be owned by the three surviving brothers, the defendants in this action.

9. That the Fleming Building in the city of Des Moines and other real estate is a part of the assets of Fleming Brothers, Incorporated, the interest of plaintiff's deceased husband in said property, being evidenced by his certificate of stock in Fleming Brothers, Incorporated, in the amount of Twenty-five Hundred Shares.

10. Plaintiff further alleges that the three brothers of her deceased husband, who are named as defendants herein, claim that said stock is theirs, and have turned in and had cancelled each certificate of Twenty-five Hundred Shares and have turned in and marked cancelled the certificate of Twenty-five Hundred Shares, which this plaintiff alleges was the property of her deceased husband and have had re-issued to themselves the Ten Thousand Shares in certificates of one-third of Ten Thousand Shares to each of them.

11. That said three brothers of plaintiff's deceased husband, named as defendant herein have collected the Fifty-eight Thousand Dollars life insurance upon the life of plaintiff's deceased husband and have converted the same to their own use.

12. That the defendant, John A. Fleming, Administrator of the estate of plaintiff's deceased husband, Charles Fleming, filed in the probate division of this court, a statement claiming that he and his said two brothers, to wit, Stanhope and Robert, were the owners of all of the property of Charles Fleming, deceased, save and except the exempt household goods composed of: Four Bed Room Suites, Five Book Cases, Three Hundred Volumes private Library, Household Furniture for dining room, living room and porches, etc., one Weber piano, One Edison Phonograph, One Watch, Dishes, Cooking Utensils, Kitchen Furniture, which the administrator estimated to be of the value of Five Hundred Dollars, though the same has not been appraised, and in said inventory or statement, set aside this property for the use and benefit of the wife of Charles Fleming, deceased; but claims that all of the balance of the property of Charles Fleming, deceased, the deceased husband of plaintiff, belongs to himself and said two brothers, and claims that the said property belongs to them, i. e., Robert J. Fleming, John A. Fleming and Stanhope Fleming, on account of three certain written agreements entered into; one on the 14th day of December, A. D. 1896; the next one on the 23rd day of January, A. D. 1897; and the third and last one, on the 17th day of January, A. D. 1911; said first contract being in words and figures as follows:

EXHIBIT 101 TO PETITION

(Identified in Evidence as Exhibit 101)

"Know all men by these presents that we Robert J. Fleming, Charles Fleming, John A. Fleming, and Stanhope Fleming, of the city of Des Moines, State of Iowa, in order to provide for the future uninterrupted prosecution of the business of Life Insurance in which we are now or may be hereafter engaged and mutually associated, and to fix and determine the interests of each therein, hereby mutually agree, and bind ourselves, our heirs, executors, administrators or survivors and all other persons, that, each of the parties to this stipulation and agreement, shall have only such share of, and interest in the profits, earnings and income of the business of Life Insurance in which we are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each, with the consent of the others, from the income of said business. And such amount so paid shall fully represent the share and interest of each of the parties hereto, at any time while we the undersigned shall be associated together in said business or thereafter. Upon the death or withdrawal of any party hereto, all his interest in said business shall thereupon cease and determine and at no time shall any accounting be made or required to be made by any party hereto, his representatives, executors, heirs or survivors, or any other person claiming under him, or to any person officer or representative, upon any basis of labor performed or money received on account of said business by any of the parties hereto or otherwise. And it is distinctly understood and agreed between the parties hereto that they, nor any of them have, or can have any property rights, or money interests in said business other than that herein specified and defined, and

9 any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business.

Signed this 14th day of December, A. D. 1896.

Robert J. Fleming. Charles Fleming.
 John A. Fleming. Stanhope Fleming.
 In presence of Geo. B. Frye, Witness."

Said second contract being in words and figures as follows:

EXHIBIT 102 TO PETITION

(Identified in Evidence as Exhibit 102)

"Know all men by these presents: that we, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming of the city of Des Moines, Iowa, in view of our past association in, and the manner of the conduct of our business without the usual and ordinary incidents of a partnership, and to more effectually define and determine our individual interests in said business in the future, as

between ourselves and in relation to all other persons, and to provide for the future uninterrupted prosecution of said business in which we are now engaged, or may be hereafter associated, hereby mutually agree and bind ourselves, our heirs, executors, administrators, survivors, and all other persons as follows: That in consideration of the services of each of us rendered, or hereafter to be rendered in the business of life insurance, of the income to be derived therefrom and of the mutual stipulations herein contained, each of the parties to this agreement has, and hereafter shall have, only such share of, and interest in the profits, earnings, renewals due or to become due under any and all contracts of insurance, or commissions thereon, to whomsoever nominally payable in the business of life insurance in which we are now or any of us shall hereafter be jointly engaged, as shall be actually received by each, or shall be paid upon the order of each with the consent of the others, from the general funds or income of said business; and any sum or amount so paid shall

10 fully represent the share and interest of each of the parties hereto at any time while any of the undersigned shall be associated together in said business or thereafter. It is further agreed that upon the death or withdrawal of any party hereto, all his interest in said business, and in the assets thereof, shall thereupon cease and determine; and at no time shall any accounting be made, or required to any person, or any party hereto, or their heirs, executors, administrators, survivors or representatives. It is further stipulated and agreed that any and all contract rights, and all interest in renewals of policies of insurance in the Mutual Life Insurance Company of New York, due or to become due since January 1893, all commissions earned or hereafter to be earned, and all bonuses, allowed, payable or to become payable in any manner, whether payable to or standing in the name of Robert J. Fleming or any other of the parties to this agreement, are hereby assigned and transferred to, for the mutual benefit of the parties hereto, to be used, applied and disposed of in the manner only as herein agreed and provided for. It being the intention of all the parties to this agreement, and they hereby declare that they, nor any of them have, or can have any property rights or money interest in said business other than that herein specified and defined, so long as any of them shall be associated together in the business of life insurance.

Witness our hands this twenty-third day of January A. D. 1897.

Robert J. Fleming. Charles Fleming.

John A. Fleming. Stanhope Fleming.

Witness as to signatures of Robert J.,
Charles, John A., and Stanhope Fleming.
A. W. Brown."

The third contract being in words and figures as follows:

11

EXHIBIT No. 103 TO PETITION

(Identified in Evidence as Exhibit 103)

"Whereas, the undersigned, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming, are engaged in the life insurance business in the States of Iowa, Nebraska and Wyoming under a contract with the Massachusetts Mutual Life Insurance Company; and,

Whereas, each of the undersigned is the owner of one-fourth of the stock of a corporation organized under the laws of the State of Iowa known as Fleming Brothers, Incorporated; and,

Whereas, the undersigned also are the owners of certain real estate and other property in which each of them is interested; and,

Whereas, the undersigned expect to acquire additional property hereafter; and,

Whereas, the said property now held and owned by the undersigned has been acquired by them with the understanding that it shall be disposed of as hereinafter set out;

Now, therefore, in consideration of the premises and one dollar in hand paid by each of the undersigned to each of the other whose names are signed hereto;

This agreement made and entered into by and between the said Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming on this 17th day of January, A. D. 1911, will witness:

1st. That the partnership between the undersigned is with the express and distinct understanding and agreement that all of the property heretofore acquired by the undersigned has been acquired as the results of the said partnership, and that said property now belongs to the said partnership, including all proceeds of said insurance business with the renewals to which the parties hereto may be entitled thereon.

2nd. That upon the death of either one of the undersigned, the property then owned by the said partnership, including all property

12 standing in the names of the individual partners which embraces said stock in Fleming Brothers, Incorporated, shall be and become the property of the surviving brothers of the said partnership; and that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein.

The premiums upon all insurance carried by the undersigned, whether life or accident, (except policy #741051 in the Mutual Life Insurance Company of New York, upon the life of Robert J. Fleming, payable to Emma D. Fleming, his wife, which policy is not a part of the said partnership property) have been paid by the said partnership, and the said partnership is entitled to the proceeds of all such insurance except the policy above referred to payable to Emma D. Fleming.

3rd. This contract covers not only the property now owned, but also property hereafter acquired, and all hereafter acquired property, including the proceeds of life insurance, whether standing in the name of the said individuals, or either of them, or in the firm name, is understood to be firm property, unless there be an express agreement to the contrary.

Executed in quadruplicate.

Robert J. Fleming. John A. Fleming.
Charles Fleming. Stanhope Fleming.
Witness as to signatures of Robert J.,
Charles, John A. and Stanhope Fleming.
Katherine D. Ives.

13. The plaintiff further alleges that said three contracts are null and void insofar as they affect her rights as the surviving widow of Charles Fleming, deceased. That said contracts are null and void for the reason that they are without consideration and contrary to public policy. That they are further null and void, because they operate as a fraud upon this plaintiff and her rights as the widow of the deceased.

13 14. Plaintiff further alleges and claims that she is entitled to the distributive share of the property of her deceased husband Charles Fleming, in accordance with the provisions of the statutes of Iowa. Plaintiff alleges that there being no issue she, as the surviving widow, is entitled to Seventy-five Hundred Dollars, and one-half of the remainder of plaintiff's deceased husband's estate; and that she is entitled in addition thereto to a reasonable amount for her support for the period of one year from the death of her said husband.

15. Plaintiff further alleges that her husband died seized of an undivided one-fourth interest in all of the property of the Fleming Brothers, as a partnership, which partnership property includes all of the capital stock and property of Fleming Brothers, Incorporated, and also Fifty-eight Thousand Dollars of life insurance, and real property standing in the name of her deceased husband; all of which is claimed by the three brothers of Charles Fleming, deceased.

16. Plaintiff further alleges that said contracts herein set out, are testamentary in character and purport to do or to accomplish in themselves what cannot be accomplished by will, under the statutes of the State of Iowa, and are of no binding force or effect upon this plaintiff; and as a transfer of property are without consideration and colorable only; not in good faith, and for purpose of defeating plaintiff's rights as widow; that they were concealed from her and not made known to her until after the death of her husband; and that during all the years of her married life, she has never been advised of any arrangements such as is outlined in said contracts;

14 and that she performed her duties as wife during all of said time and assisted in accumulating, by so doing, the property of which her husband died seized.

17. That this plaintiff is not advised as to the extent of the property of the Fleming Brothers, as a partnership, or of the property

of the Fleming Brothers, Incorporated, nor as to the actual extent of real estate standing in her husband's name except that described in inventory of Charles Fleming's Estate at the time of his death, further than is stated in this petition.

Wherefore, plaintiff prays that the court enter a decree in this matter construing said contracts herein set out to have no binding force or effect upon this plaintiff, and decreeing that as to this plaintiff that Charles Fleming died intestate; and that this court further decree that all of the property now held by the defendants including all the assets of Fleming Brothers, Incorporated, represented by the corporate stock, which is a part of the property of said defendant partnership be held insofar as the interest of this plaintiff is concerned, in trust for her; and that the amount of her interest under the statutes of the State of Iowa, as the surviving widow of Charles Fleming, deceased, be fixed and determined by this court and be impressed in that amount upon said property in the hands of the defendants; and that in addition to her distributive share under the statutes of Iowa, she be decreed a proper amount for her support during the first year immediately following the death of Charles Fleming; and that she be decreed such other, further and different equitable relief as to the court may seem just in the premises, and for her costs in this action incurred.

(Duly verified.)

- 15 Thereafter, on the 11th day of September, 1916, the defendants filed in the said court and cause the following:

ANSWER

Come now the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, individually and as surviving joint tenants of the concern known as and doing business as Fleming Bros., and John A. Fleming as administrator of the estate of Charles Fleming, deceased, and for answer to the plaintiff's petition filed herein July 3, 1916, respectfully show to the court:

Paragraph 1. The defendants deny each and every allegation contained in the plaintiff's petition except such as are hereinafter specifically referred to and specifically admitted.

Par. 2. The defendants admit the allegations of paragraphs 1 and 2 of the plaintiff's petition.

Par. 3. The defendants admit that the plaintiff joined in petitioning for the appointment of John A. Fleming as administrator of the estate of Charles Fleming, deceased, but in all other respects deny the allegations of paragraph 3 of the plaintiff's petition.

Par. 4. Answering paragraph 4 of the plaintiff's petition, these defendants admit that they claim to own jointly and aver that they do own jointly as surviving joint tenants, all of the property in which their deceased brother, Charles Fleming, had an interest during his lifetime, his household effects alone excepted. They admit that the

said joint estate in which their deceased brother, Charles Fleming, was interested in his lifetime did not and does not include the household effects of which their said deceased brother was possessed.

16 That as to when the plaintiff learned for the first time of the nature, character, and extent of the interest of these defendants in the property referred to in paragraph 4 of the plaintiff's petition, these defendants have neither knowledge nor information sufficient to form a belief.

Par. 5. Answering paragraph 5 of the plaintiff's petition, these defendants expressly deny that they together with Charles Fleming in his lifetime, were associated in business as a partnership, and expressly deny that they owned all of their property in equal proportions, and expressly deny that their brother, Charles Fleming, died seized of an undivided one-fourth interest in any property or in any partnership property or in any property owned by Fleming Bros., and deny each and every allegation of said paragraph 5 of the plaintiff's petition.

Par. 6. Answering paragraphs 6 and 11 of the plaintiff's petition in relation to insurance upon the life of their deceased brother, Charles Fleming, these defendants deny the allegations of said paragraphs of plaintiff's petition and in relation to said life insurance aver the facts to be that Fleming Bros., a joint tenancy composed of Robert J. Fleming, John A. Fleming, Stanhope Fleming, and Charles Fleming during the lifetime of the latter, at the joint expense of said joint tenants carried a considerable amount of life insurance upon the life of each of the said four joint tenants and that each and every policy of insurance upon the life of each and every of the said four joint tenants was payable to the other members of said joint tenancy or the survivors of them, save and except policy No. 741,051, issued by the Mutual Life Insurance Company of New

York upon the life of Robert J. Fleming payable to Emma
17 D. Fleming, his wife, which policy is not a part of the joint property of Fleming Bros.; the same being the policy referred to in the contract of January 17, 1911, referred to in plaintiff's petition. That Fleming Bros., as such joint tenants, carried and collected life insurance to the gross amount of \$55,482.26 upon the life of Charles Fleming under policies each and every of which were payable to Robert J. Fleming, John A. Fleming, and Stanhope Fleming, or to the survivor of them. That of the said amount of life insurance upon the life of Charles Fleming, \$18,474.87 was deducted therefrom and applied by the insurance company issuing said policies in payment of loans which had theretofore been obtained and which were outstanding upon said policies, and that the balance of \$37,007.39 of the proceeds of said policies upon the life of Charles Fleming was by the beneficiaries paid to the Mutual Life Insurance Company of New York on loans made by said company upon policies upon the lives of these defendants. That all of the policies upon the life of Charles Fleming were policies issued by the Mutual Life Insurance Company of New York. These defendants deny that their brother, Charles Fleming, as an individual, carried any life

insurance, and deny that there was any insurance upon his life, other than that hereinbefore referred to payable as aforesaid.

Par. 7. Answering paragraph 7 of the plaintiff's petition, these defendants admit that jointly with their deceased brother, they formed a corporation at about the time stated in plaintiff's petition known as "Fleming Brothers, Incorporated." They deny that the stock in said corporation was equally divided as alleged in plaintiff's petition, and deny that it was in any wise divided except

18 nominally in the manner hereinafter set forth, and these defendants aver that about the year 1913, pursuant to the contracts referred to in the plaintiff's petition, certificates aggregating twenty-five hundred (2,500) shares were issued by said corporation in the name of each of the four brothers, joint owners and tenants as aforesaid. That upon the issuance of said certificates each of the four brothers, Charles Fleming included, forthwith endorsed in blank the certificate or certificates issued in the name of each, and each of the four brothers as joint tenants thereupon forthwith deposited all of the certificates, pursuant to said contract, in a common receptacle in their offices to which each and all of the four brothers, as such joint tenants, had access at all times. That in truth and in fact the entire stock of Fleming Brothers, Incorporated, was at all times and now is owned jointly by Fleming Bros., as joint tenants and by the survivors or survivor of them in the case of the death of any of the joint tenants. These defendants expressly deny that there was ever at any time any division of the stock of Fleming Brothers, Incorporated, among Robert J. Fleming, John A. Fleming, Charles Fleming, and Stanhope Fleming, but aver that Fleming Brothers, Incorporated is now and at all times has been owned as a joint tenancy by the joint tenants aforesaid and the survivor of them, and these defendants admit the allegations of paragraph 10 of the plaintiff's petition except in so far as the same are qualified by this paragraph of their answer.

Par. 8. Answering paragraph 8 of the plaintiff's petition, these defendants aver that any and all real estate which at the time of his death stood in the name of Charles Fleming was at all times and is the property of Fleming Bros., with the incident of survivorship as between them; that all such property was acquired with joint funds and held for the joint benefit of said joint tenants and the survivors or survivor of them. That by reason of the fact that the only interest Charles Fleming, deceased, ever had in said real estate was that of a joint tenant, said Charles Fleming did not die seized of any estate in real estate and the plaintiff is not and never was seized of, possessed of, or entitled to any dower interest or distributive share in any real estate by reason of her relationship to Charles Fleming.

Par. 9. Answering paragraph 12 of the plaintiff's petition, these defendants admit the allegations thereof except as qualified or explained by the allegations of this answer; they admit that said paragraph 12 contains substantially correct copies of the three certain contracts therein referred to and these defendants aver that under and by virtue of the said contracts in said paragraph referred

to, these defendants as surviving brothers and joint tenants of Charles Fleming, deceased, are the absolute owners of all of the property of every name and nature of which Charles Fleming was possessed or to which he had title in his lifetime, save and except such exempt personal property as has been set aside to the
 20 plaintiff, and these defendants aver that the said contracts are valid and binding in all respects upon the plaintiff and are binding upon and inure to the benefit of these defendants as the surviving joint tenants of their late brother, Charles Fleming, deceased.

Par. 10. Answering paragraphs 14, 15, 16, and 17 of the plaintiff's petition, these defendants expressly admit that the plaintiff (as she alleges in paragraph 16 of her petition), performed her duties as wife of their deceased brother throughout his married life. But these defendants expressly deny each and every other allegation thereof and especially deny that the existence of the three contracts referred to in the plaintiff's petition was concealed from her but aver the fact to be that during all of the period of his business life and during all of the period of the existence of the marriage relation between the plaintiff and Charles Fleming, deceased, the said Charles Fleming did business jointly as a joint owner, joint worker, and joint tenant with his said three brothers, and not otherwise. That during all of said period neither the said Charles Fleming nor any other member of said joint tenancy conducted any business or acquired any property individually except some household effects, wearing apparel, pin money, and the like. That during the entire business life and career of Charles Fleming, and during the entire period of his marriage relation with the plaintiff, all of the affairs of himself and his three brothers, these defendants, has been conducted jointly, and his personal and household expenses, including the personal expenses and pin money of the plaintiff, were paid out on checks issued and signed by Fleming Bros. That during all of the said period each and every member of the Fleming Family including the plaintiff, has received
 21 all personal funds, all maintenance, and all pin money, from Fleming Bros. That the plaintiff has at all times been regarded and is now regarded and at all times in the future will continue so to be regarded by these defendants as a member of the Fleming Family, and as such these defendants hope to continue to do in the future as they have at all times done in the past, and as they do now, namely, to supply the plaintiff as a member of the Fleming Family with every necessity, comfort, and luxury enjoyed by the Fleming Family and the several members thereof. But these defendants expressly deny that their brother, Charles Fleming, died seized or possessed of any estate in any property whatsoever, except household effects, and expressly deny that their said brother, Charles Fleming, either during his lifetime or at his death, either owned or was possessed of, or entitled to any estate of inheritance or any estate in which the plaintiff was, is, or could be entitled to a dower or distributive share or interest of any sort.

Wherefore, these defendants pray that the plaintiff's petition be dismissed and that judgment be rendered against the plaintiff for the costs of this proceeding.

(Duly verified.)

Thereafter, on September 22, 1916, the plaintiff filed in said court and cause the following:

REPLY

Comes now the plaintiff and for reply to the answer of defendants filed herein,

22 & 23 For reply to paragraph ten of defendants' answer this plaintiff denies that Fleming Brothers, or any other person than her husband provided her with household effects, wearing apparel, pin money or anything else necessary for her support. That the checks for her allowance, and for the money used were signed by Fleming Brothers, of which her husband Charles Fleming was one of the four, constituting said Fleming Brothers, which this plaintiff always believed and now believes was a partnership, in which her deceased husband, Charles Fleming contributed as much time, energy and ability as any one of the four; that she never understood then, or does she understand now, that she and her husband were objects of charity or that they were being supported by Fleming Brothers, but this plaintiff alleges the fact to be that during the thirty-five years of her married life with Charles Fleming, that he earned a living for her and supported her well and accumulated by lifetime work and energy he one-fourth interest in Fleming Brothers and that she as his wife did her part, was economical and worked hard and faithfully.

Defendants allege:

"That the plaintiff has at all times been regarded and is now regarded and at all times in the future will continue so to be regarded by these defendants as a member of the Fleming Family, and as such these defendants hope to continue to do in the future as they have at all times done in the past, and as they do now, namely, to supply the plaintiff as a member of the Fleming Family with every necessity, comfort and luxury enjoyed by the Fleming Family and the several members thereof."

Plaintiff denies that she has in the past or never has been supported by any of the defendants in this cause of action, or that she is indebted to them in any sum or in any manner for the furnishing of necessities, comforts or luxuries; that all that she has had during the thirty-five years of her married life were furnished by her deceased husband, Charles Fleming, and that she is in no way dependent upon the defendants for any of such support; and further alleges that when she was first advised by Stanhope and John Fleming that she had no interest in the estate, save and except about three hundred dollars worth of household goods, that this plaintiff at that time inquired concerning her allowance and was informed

25 by John Fleming that the allowance her husband had given her heretofore was a good deal of money and that she could get along with less, said allowance having been Forty-five Dollars per week, for the purpose of maintaining herself and her home. Later, the defendant, Robert Fleming, informed her that if they supported her, she would have to go to live with, and keep house for John Fleming, and that they would give her such allowance as they saw fit. Plaintiff asked if she was to have a writing to the effect that she would have her allowance, and the defendant, Robert Fleming told her that she would have to take his word for that, and she would never get any writing out of them. Whereupon plaintiff refused to assent to the arrangements they saw fit to make.

Plaintiff further alleges that her allowance of Forty-five Dollars per week has been continued, but alleges that the same is part and portion of that portion of her husband's estate, which by law belongs to her, and is not a donation, nor a charitable contribution from Fleming Brothers.

Wherefore, plaintiff prays as in her original petition and asks in addition thereto that the pretended writing, bearing her signature, purporting to be a deed, releasing any of her rights in any of the property of her deceased husband, Charles Fleming be decreed to be null and void on account of fraud and duress and lack of consideration.

(Duly verified.)

Thereafter, on the 11th day of December, 1916, at a regular term of the said court the said cause came on for hearing in equity before the Honorable Charles A. Dudley, one of the judges of said court, and the following proceedings were had.

26

PLAINTIFF'S EVIDENCE.

Mrs. ANNA B. FLEMING, the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Earl C. Mills:

I am the plaintiff in this action and the widow of Charles Fleming. We were married January 2, 1880, at Williamston, Michigan. My husband died January 15, 1916.

My husband had three brothers, Robert, John and Stanhope Fleming, living at the time of his death. A sister, Jennie, and his father and mother had predeceased him.

We lived in the town of Marshall, Minnesota. When we first went there, Charles Fleming had these old horses and some old wagons that was spoken of (in the opening statements) that he took care of and sold, and then afterwards he came down to Dubuque at

different times and with his brothers they bought up carloads of horses and he brought them back and we kept a stock barn and he sold those horses and we had this piece of property there, 27 & 28 forty acres of ground, and we raised crops on it. Fleming Bros. were supposed to own that forty acres. There was no house on it. It was cultivated.

When my husband and I came to Des Moines he went into the insurance work with his brothers, Robert, John and Stanhope. He continued in that business until the time of his death.

29 All three said they had never saw or found any will of Charlie's. I said that seemed very strange that he would not have a will or something stated in writing or something like that, that I could know something about, and then Mr. Rob Fleming said, "Why there is. We have a contract," he says, "that is just the same as a will or a deed." Prior to that moment I had never in my life heard of any such contract. That was my first knowledge of the kind. That was April 11. During the week between April 4 and April 11 they had told me that I did not have any interest. I never heard of these contracts until April 11.

Speaking of that contract, Robert said, "We have a contract and," he said, "you know about that." I said, "No, Rob, I never heard of the contract." He said, "Well, that is just the same as a will," he said, "or a deed. You could not break it any easier than you could a will. And," he said, "Hope, you get the contract and let her read it." Hope went and got the contract to let me read it and while I was trying to he held it in his hands for quite a long time and explained that this contract was the same as a will or a deed and went on to tell how they had had this for some time and he asked me then if I hadn't known anything about it. I said, "I never heard of it." I said, "This is my first knowledge of anything of this kind." And then Rob told him to hand it over to me to read and they all three began talking to me so much that I didn't get any sense of the reading at all. Before I could get across one 30 & 31 line one would be asking me something, and then the other, and I had no knowledge when I got through of what was in it. This is the first time that I had any actual knowledge of the existence of the contract.

32 Q. Now, Mrs. Fleming, what of your husband's estate was set aside to you by the administrator, John Fleming, if you know?

A. I don't know as any, excepting my household goods.

33 That is all I have had any knowledge of.

Since my husband's death they have sent me the allowance of \$45 a week up to date. They said that they thought it was too much.

At the time I signed these papers on the 11th of April and at the other time, I did not intend to waive any of my rights in my deceased husband's estate, and I did not understand that I was waiving any rights in his estate.

Cross-examination.

By Mr. W. E. Miller:

My petition alleges that Charles Fleming and I were married January 2, 1881. My testimony on direct examination that we were married January 2, 1880 is correct. At that time I was twenty years of age. My husband was twenty past. He was born July 4, 1860 and I was born November 3, 1860. I am fifty-six years old the third of November. My husband, Charles Fleming, died without children surviving him. We had one child which died in infancy. He was born November 22, 1882 and died January 26, following.

When we were first married we lived for several months,—two or three months,—in the Fleming home at Williamston. The household there consisted of Mother Fleming, Jennie Fleming, 34 Robert Fleming, John Fleming, and Stanhope Fleming.

Charles and myself were there a couple of months. John and Stanhope were single. Robert had been married a couple of years before but his wife had died the 26th of January, the month I was married. So, during the time I lived as a member of that household, Robert J. Fleming lost his wife.

At that time the four brothers were engaged in the milling business together. They had a sawmill they were working in. Their father was deceased and the brothers were carrying on the business.

Q. Mrs. Fleming, do you know anything about how they managed their finances at that time?

A. I did not. I never heard how they did.

Q. You don't know whether they had any method of sharing or dividing up or not?

A. No, sir, I never heard them mention it.

After staying with the family for a time, my husband and I took apartments over a store. We had our own little home for a long time and then we bought a little place on High Street and lived there until they had the failure in business which occurred about 1885. It was just a few weeks before Mr. Robert Fleming went up to Saint Paul.

Q. Now, during the time that you occupied these apartments, do you know anything about any change in their financial arrangements having occurred?

A. Not at all, excepting that they lost all that they had there. That was the only thing I knew.

35 The house that my husband and I bought was not paid for. We were to pay so much each month. The business failure interfered with that project and we let it go.

So far as I know the financial arrangements of the four brothers between themselves continued unchanged.

My husband and John left about the same time and the three of them, Robert, John, and Charles, engaged in some railroading contract. During the time my husband was gone on that enterprise I

was part of the time with my parents and part of the time with Charlie's mother. They were engaged in that railroading enterprise a little over a year.

Q. Do you know anything about their financial arrangements as between themselves during that time?

A. No sir, I did not.

36 I did not receive much in the way of remittances. None of the family were receiving very much along about that time, but whatever there was was sent to their mother because she was the one that was keeping the home. When I stayed there with their mother, I never was at any expense.

When they had completed their work, my husband settled back into Marshall, Minnesota, and had these old horses and wagons left there for him to sell and take care of, and then his mother went to Dubuque to live and I went up there to Marshall, Minnesota, to be with my husband. During the time Robert, John, and Charles were in Minnesota on the railroad job, Stanhope was with his mother working around there. He went to Dubuque when she did and I went first to Dubuque and from there to Marshall. I stopped in Dubuque just a little time until the mother got settled, and then I went to Marshall, Minnesota with my husband. I only stopped at Dubuque a short time—a week or two.

We were in Marshall for something over five years.

These horses and wagons and things I spoke of and the lands we occupied and farmed up there all belonged to Fleming Bros.

Q. So far as you know, Mrs. Fleming, no one of the brothers acquired any individual interest in any of those lands in Minnesota?

A. I don't know anything about that part of it.

Q. I say, so far as you know?

A. Yes, sir, so far as I know.

Q. And furthermore, so far as you know, whatever they had up there in the way of lands or contracts for lands, or wagons or horses belonged to the brothers?

A. Belonged to the four of them, or was supposed to.

37 Q. Belonged to the four of them?

A. Yes, sir.

Q. That was your understanding at the time?

A. Yes, sir.

Q. And has been your understanding ever since?

A. Yes, sir.

My husband and I came down to Des Moines in 1893. The other three brothers were here at that time and their mother and sister came from Dubuque to Des Moines at that time.

Q. And what was the household arrangement then as to who composed the household when you moved here to Des Moines?

A. Why, there was Mother Fleming and Jennie and Robert Fleming, John Fleming, Stanhope Fleming, and Mrs. Anna Bulger.

Robert Fleming had not remarried at that time. My husband and I came here in the fall of 1893, and were for a time inmates of the same household,—members of the same household as the other members of the family. That arrangement continued during that winter, I believe.

Q. So far as you know the expenses of Charles Fleming and wife were handled by the brothers?

A. Why all the expenses were handled possibly that way.

My husband and I went to housekeeping in the spring of 1894 and have lived in Des Moines since that time except for that part of a year that Mrs. Fleming was sick they thought Charlie ought to go to Dubuque to be in the office there because he was traveling and was away from home most of the time, and the boys suggested
38 that he should go there and live where he could be in and out oftener than he was here, and we moved there and we was only there a short time when their mother took sick and they sent for me and I came back here and stayed in the family and helped them with their home duties and things. She died and was taken away and then John asked me to remain with Jennie for a short time which I did, and then Charlie moved our furniture back here to Des Moines and we stayed here from that time on. It was not more than eight or nine months that we were out of this city and in Dubuque. That was about 1897.

39 When we returned from Dubuque to Des Moines, my husband and I went to housekeeping on Sixth Avenue, north of Clark. We lived there until 1888 or 1890. It was rented property, and then we moved across the street into another rented property. I do not know of my own knowledge who paid the rentals or from what source they came. I don't remember how long we remained at the last mentioned place. We were there a long time and then we moved onto Woodland Avenue in the Shore flats, where we lived about a year. All these were rented properties. From the Shore flats we went to the Chamberlain house at 1820 Ingersoll Avenue and continued to reside there for about nine years until the death of my husband.

Q. Do you know of your own knowledge from what source the rents on the Chamberlain flats and on the Shore flats were paid?

A. Why, they were paid from the office.

Q. As a matter of fact they were paid, as you understood it, and as you understand it, by checks from Fleming Bros.?

A. Yes, sir, they were paid by Fleming Bros.

40 While my husband was engaged in business there in Dubuque,—it was in the life insurance business, Fleming Bros.—the agents for the Mutual Life Insurance Company of New York. Since I came to Des Moines in 1898, I obtained funds by going to the office and having a check that Mr. Fleming gave me. The checks were signed, "Fleming Bros." Sometimes the checks were signed by Rob, sometimes by John, and sometimes by my husband,

Charles. I never received a check for that purpose which was signed otherwise than "Fleming Bros."

Q. How was the "brothers" spelled?

A. B-r-o-t-h-e-r-s.

Q. Always spelled out?

A. Yes, sir.

Q. You are quite sure of that?

A. I am not going to be positive, but I think the checks could be brought forth and shown for evidence. I have one check in my purse now.

Q. You say you have got one. Let us take a look at it and see how it is signed?

A. All right.

(The witness produces a check dated December 9, 1916, payable to Mrs. Charles Fleming, \$45, drawn on the Citizens National Bank of Des Moines.)

Q. And how is that signed?

A. Fleming Bros. My husband always signed them that way too. He has signed many a check for me.

41 These checks which were handed to me were sometimes handed me by the bookkeeper, sometimes by Mr. John Fleming,—and most often by Mr. John Fleming since my husband's death. I have been receiving a weekly check from Fleming Bros. for \$45 for four or five years, probably. Since my husband's death I have received those checks regularly, \$45 a week. Prior to the time when they were turning over checks for \$45 a week, I received checks for smaller amounts. I have had money whenever I was in need of money, but I couldn't say the amount. But it did not come up to \$40 or \$20.

Q. Prior to this time when you began getting the \$45 checks, did you get regular weekly checks or regular monthly checks, or how?

A. Well, whenever I was in need of money, Mr. Fleming gave it to me.

Sometimes in money, sometimes in a check. I couldn't say how the checks were signed, but it must have been Fleming Bros., but I could not say, because I never gave any attention to that part of it.

Q. Did your husband ever hand you a check that was signed, "Charles Fleming"?

A. He has on my birthdays.

Q. On your birthdays? When did he do that, Mrs. Fleming? Now please be sure that you understand. I want to know if he ever handed you a check to which the single name, "Charles Fleming," was signed?

A. I would not positively say, because it is something I do not remember.

I do not know of my husband ever having had an individual bank account standing in his own name which he used for current purposes.

42 & 43 Q. During the time of your residence in Des Moines, both before and after your residence in Dubuque, do you know of any change having occurred in the business and financial relations of the four brothers?

A. I do not.

Q. So far as you are aware the same methods were pursued and arrangements made as had prevailed from the earliest relationship that you bore to the family?

A. Yes, sir.

Q. And continued to the time of the death of your husband?

A. Yes, sir.

Q. Mrs. Fleming, since the brothers engaged in this insurance business at Dubuque and Des Moines, has there ever been a single instance, down to the death of your husband, when you applied at the office either in Des Moines or Dubuque, for money that it was denied you?

A. No sir.

Since the time of my husband's death, I have received each week from Fleming Bros., a check for \$45.

I relinquished that house at 1820 Ingersoll avenue in September, 1916. I moved out in October, 1916. I never paid the rent on that house out of any moneys which I had received. I understood the house rent was paid from the office by Fleming Bros.

44 The defendants offer in evidence the petition for letters of administration in number 9562, Probate, Estate of Charles Fleming, as a part of this cross examination. Said petition is as follows:

PETITION FOR LETTERS OF ADMINISTRATION

To the said District Court of Polk County, Iowa:

Your petitioners, Anna B. Fleming, Stanhope Fleming, Robert J. Fleming, and John A. Fleming, respectfully show that Charles Fleming, late of said county, now deceased, died at Des Moines, in Polk county, Iowa, on or about the 15th day of January, 1916, leaving no last will and testament so far as known to and believed by these petitioners. That said deceased left surviving him Anna B. Fleming, as his widow, who resides at Des Moines, and also the following heirs at law, namely: Robert J. Fleming, brother, 59 years of age, of Des Moines, Iowa, John A. Fleming, brother, 53 years of age, of Des Moines, Iowa, and Stanhope Fleming, brother, 51 years of age, of Des Moines, Iowa, and all residents of Polk county, Iowa; that said deceased died seized of the following described real estate, namely:

The undivided one-half ($\frac{1}{2}$) of the south half (S. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section eight (8), in township one hun-

dred eleven (111), of range forty-one (41), in Lyon county, Minnesota, and

A part of lot five (5) of the subdivision of the north half (N. 45 ½) of the northeast quarter (N. E. ¼) of section seven (7), township seventy-eight (78), range twenty-four (24) west of the Fifth P. M. Iowa, known as Pierce's Subdivision and now included in and forming a part of the city of Des Moines, Iowa, described as follows: Commencing at a point 200 feet west of the northeast corner of said lot 5, running thence south eighty rods, to the south line of said lot, thence west along the south line 65.32 feet, thence north 40 rods, thence west 165 feet, thence north 40 rods to the north line of said lot 5, thence east 230.32 feet to the place of beginning, and

Lots five and six in Block A, of Beck's Replat of Okoboji City, Dickinson county, Iowa.

all subject, however, to the terms of three (3) certain contracts dated respectively, December 14, A. D. 1896, January 23, A. D. 1897, and January 17, A. D. 1911, between the deceased and his brothers above named, and also personal property governed by the same contracts of about the value of 500.00 dollars, which may be lost, destroyed or diminished in value if speedy care be not taken of the same.

Your petitioners being respectively the surviving widow and heirs at law of said deceased, therefore pray that letters of administration may be granted unto John A. Fleming, on the estate of said Charles Fleming, deceased.

Anna B. Fleming. Robert J. Fleming. Stanhope Fleming. John A. Fleming.

STATE OF IOWA.

Polk County, ss:

Subscribed and sworn to by Anna B. Fleming, Robert J. 46 & 47 Fleming, Stanhope Fleming and John A. Fleming on this 11th day of April, 1916, before me the undersigned notary public in and for Polk county, Iowa.

A. G. Rippey, Notary Public in & for Polk County, Iowa. (Seal.)

48-50 I remember that some time in August, 1915, Dr. Babcock of Chicago came out to see my husband professionally and he also came again later on, probably in November. His services were paid by the check of Fleming Bros. The first trip \$500 and the second one \$100. From time to time my husband and myself had occasion to consult Dr. Priestly and the bills for those medical services were paid by the checks of Fleming Bros. I had two or three different sick spells. I had pneumonia in the fall of 1899 and was sick until along in the spring of 1900. These medical expenses were paid by the checks of Fleming Bros. but my husband stood at the foot of it.

Q. Do you know that it is a fact that those medical bills for yourself and husband were handled exactly the same as the medical bills

for every other member of the Fleming family? That is, paid off with the Fleming Bros.' checks?

A. Yes.

Q. The expense incident to the funerals of the mother and sister were paid, were they not, by the Fleming Bros.' check?

A. I know nothing about their checks.

Q. The expenses incident to your husband's funeral were paid for the same way?

A. I always considered it came from my own husband's work. He earned it.

Q. I am only asking you to answer one thing, and that is whether you know those bills were paid by Fleming Bros.' check?

A. I don't know, but I presume they were. I didn't see the checks.

Q. You never paid that out of your allowance of \$45?

A. No, sir, I never paid them from my allowance.

51 After the failure my husband did anything he could get to do. He worked out on the streets and our household bills were paid by my husband out of his meager earnings.

Q. In response to a question you stated that the property belonged to all of the brothers. Now, who did you mean, all four of the brothers?

A. All four of the brothers has been my understanding ever since I was in their family; whatever was earned belonged to the four in equal shares, and all their bills were paid and my husband was supposed to share his the same, and charged to him has been my understanding.

Q. Now in 1885 when there was nothing, when Charlie and the rest of them worked at anything they could get to do, did each one pay his own personal expenses?

A. As far as my knowledge.

Q. And it was after they went into the insurance, was it that they owned their property together?

A. That they accumulated the property together, as far as I have—

Q. Now you have said that the expenses were handled by the brothers. What did you mean by that?

A. Well, I supposed and have always believed and thought and as far as my knowledge went, that the expenses was divided equal. That is whatever expense that I was to or whatever money I took out was charged to my husband, and whatever the other families drew from the firm, or the amount of money or whatever they may call it, it was charged to each one of their—the head of their family.

Mr. Miller: I move to strike the statement of the witness as to what she believed and thought as being wholly immaterial, incompetent, and irrelevant.

12 & 53 Q. Now you observed that all of the bills that were met by check were met by the check of Fleming Bros.?

A. Yes, sir.

Q. And the understanding you have just spoken of is the understanding you had as to that?

A. All my married life.

Mr. Miller: I move to strike out her understanding as being incompetent.

A. It has been my knowledge as far as it could go.

54 & 55 Mr. Mills: Plaintiff offers in evidence the

INVENTORY

filed by John A. Fleming, administrator in the matter of the estate of Charles Fleming, deceased, same being No. 9562-31 Probate, as bearing upon the claim or claims made by the brothers as to their deceased brother's estate, and for no other purpose:

And now on this 26th day of April, 1916, comes John A. Fleming, administrator of said estate and says that the following pages contain a true and full inventory of all the personal estate of the deceased which has come into his hands, or of which he has any knowledge whatsoever.

The following is a list of the property considered as exempt and not liable to be sold to pay debts.

4 Bedroom suites

5 Bookcases

300 Volumes private library

Household furniture for dining room, living room, porches, etc.

56 1 Weber piano.

1 Edison phonograph.

1 Watch.

Dishes, cooking utensils, kitchen furniture.

All set aside to Anna B. Fleming, surviving widow, as exempt and as her property.

The following is all of the other personal property of deceased with which I am to be charged.

Cash on hand, None.

Cash on deposit in —, None.

See attached statement and copies of contracts.

Amounts Owning to the Estate on Open Accounts.

By Whom Owning, None; When due, —; Collectible or otherwise, —; Amount, none.

See attached statement and copies of contracts.

Amounts Owning to the Estate on Notes and Other Written Obligations.

From Whom, None; On What, —; When due collectible or otherwise, —; Amount, none.

See attached statement and copies of contracts.

Statement.

In his lifetime, Charles Fleming, deceased, was associated in business with his brothers, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, and originally the whole of the business of the four brothers was conducted as a joint tenancy in the nature of a co-partnership. This co-partnership was known as Fleming Bros. and continued to and including the death of Charles Fleming, and continues at the present time, the main interest and activity of the said joint tenancy or co-partnership being in the general agency for life insurance companies. On or about the month of April, 1901, a corporation was formed which is now known as Fleming Brothers, Incorporated, which corporation among other things, engaged in the erection, ownership, and operation of the Fleming Building in the city of Des Moines, Iowa, and owns other real estate. The entire stock of the corporation was issued to the four brothers, Robert J. Fleming, John A. Fleming, Charles Fleming, and Stanhope Fleming.

In all of the financial and domestic economies and enterprises, the said four brothers at all times throughout the period of their business activities, and throughout the active life of Charles Fleming, have acted as joint tenants, and have treated all property, funds, and enterprises as joint family or community interest for the benefit of the survivors or survivor of them.

That pursuant to their said business policy, the said four brothers did on or about the 14th day of December, 1896, make and enter into a certain contract in writing, a copy of which is hereto attached marked "Exhibit A," and made a part hereof.

That further pursuant to their said business policy the said four brothers did on or about the 23d day of January, A. D. 1897, make and enter into a certain contract in writing, a copy of which is hereto annexed, marked "Exhibit B," and made a part hereof.

That further in pursuance to their said business policy, the said four brothers did on or about the 17th day of January, A. D. 1911, make and enter into a certain contract in writing, copy of which is marked "Exhibit C," hereto annexed and made a part hereof.

That all of the property of every name and nature owned and acquired by each and all of the said four brothers, and all of the business and pecuniary interests of every name and nature of each and all of the said four brothers, has at all times been acquired, owned, held, operated, and conducted under, by virtue of, and pursuant to, the said three contracts. That Robert J. Fleming, John A. Fleming, and Stanhope Fleming, as the surviving brothers, heirs at law, and contracting parties, are advised that as such surviving contracting parties, they are the joint owners of all of the property, rights, and interest of which the said Charles Fleming, deceased, was possessed during his lifetime, and at the time of his death, and the said Robert J. Fleming, John A. Fleming, and Stanhope Fleming, as such survivors, claim to be the absolute joint owners of all of said property of every name and nature as hereinbefore referred to in which Charles Fleming in his lifetime was inter-

ested, with the right of survivorship as between the said three surviving brothers.

That there was issued to Charles Fleming in his lifetime twenty-five hundred (2,500) shares of the stock of Fleming Brothers, Incorporated, and at the same time a like amount of the stock of said corporation was issued to each of his three brothers above named: that each of the said four brothers endorsed in blank the certificates issued to him, and all of the stock of said corporation so endorsed in blank was by each of the said four brothers deposited in a drawer in the safe in the office of Fleming Bros. and of Fleming Brothers, Incorporated, each of the said four brothers having access to said stock so deposited, and that the said twenty-five hundred shares of stock so issued to Charles Fleming *was* in said manner endorsed by him in blank and in said manner deposited by him in said safe. That said endorsement and depositing of all of the said stock was pursuant to the said contracts, exhibits A, B, and C, and said endorsements and deposits were made for the purpose of giving effect to the said contracts and for the purpose of effectually passing the title to all the said stock to the survivors or survivor of the said four brothers, and for the purpose of effectually passing the title in possession of said stock of Charles Fleming to the survivors or survivor among his said brothers. That pursuant to the said contracts and to the said assignment and delivery, the entire stock of Fleming Brothers, Incorporated, issued as aforesaid, has been turned in and cancelled and in lieu thereof there has been issued to Robert J. Fleming, John A.

59 Fleming, and Stanhope Fleming, jointly (not as tenants in common), and to the survivors or survivor of them, the entire authorized stock issue of the said corporation.

That by reason of the premises hereinbefore set forth, the undersigned, as administrator, is advised, and on the basis of such advice, reports to this court that there is no property of any name or nature, and there are no rights or interests of any sort belonging to the estate of Charles Fleming, deceased, save and except his exempt household effects hereinbefore scheduled, which have been set over to his surviving widow as hereinbefore reported.

That the business policy of the Fleming brothers, as such joint owners is such that any and all known personal indebtedness, including the funeral expenses of said Charles Fleming, has been paid and all proven claims against his estate will be paid by the survivors of said joint arrangement.

(Signed) John A. Fleming, Administrator
of the Estate of Charles Fleming, Deceased.

(NOTE.—Exhibits A, B, and C, referred to in the foregoing document, are the contracts in controversy and are set out in plaintiff's petition herein.)

STIPULATIONS.

Mr. Parsons: Viewing it that whatever was the legal status of Fleming Bros., it so far partook of a partnership nature that the right

to close the affairs of the partnership belonged to the survivors, and hence plaintiff in resting reserves the right to introduce testimony as to the value of the different items of the property of Fleming Bros., unless it be conceded that the cause may proceed to decree, and in the event decree should be for the plaintiff, then the matter of the valuation of the property of Fleming Bros. may be inquired into, in so far as may be necessary. My thought being this, that whatever we call this, whether we call it a partnership or whatever we call it it so far partakes of the nature of a partnership that the right of the surviving partners which the court remembers exists at law to close the affairs of the partnership, obviates any necessity of now going into the question of what was the actual valuation of that partnership. We have introduced some evidence to show that there was something for the court to consider here in the way of value, and we do not care to cumber the record unless the court should in the final end decree for the plaintiff. Then of course that would not come up, the question of settlement would not come up until after that decree was finally adjudicated.

Mr. Miller: Defendants are content that the plaintiff should rest her cause at *that* time, reserving the right to subsequently inquire further into the assets and liabilities of Fleming Bros., but of course do not wish to be understood as conceding that the relationship between the brothers was that of a partnership in the technical sense of the word.

Mr. Parsons: The only concession I asked of you was that in the event there was a decree for the plaintiff we might subsequently go into the question of the valuation of the items. That is all.

Mr. Miller: The defendants are content that that inquiry, if it ever becomes a subject of inquiry, may be reserved to a later time following the decision of the court as to the legal status of the brothers as between themselves.

Mr. Mills: The idea is that the plaintiff is not bound by exhibit A, which was introduced as the court understands, for the purpose—

The Court: I take it your first inquiry is, What is the legal status?

Mr. Miller: That is the way we look at it.

The Court: When we determine that, then if occasion presents itself for further inquiry into the details by way of setting it, if it should be adjudged to be a partnership, then you can inquire into it. I understand that is the concession.

Mr. Miller: That is the purpose we have.

60½ Mr. Mills: That is the purpose the plaintiff has.

The Court: With that reservation you may proceed.

Mr. Mills: With that reservation,

The plaintiff rests.

61

DEFENDANTS' EVIDENCE

Mr. Miller: Now, if the court please, in opening the testimony on behalf of the defendants, it seems to me to be necessary that the following statement should be made in the record. The defendants

Minnesota State Library, St. Paul, Minn.

apprehend that the details of their handling of their personal finances and of the financial relations between them, so far as the items are concerned, are practically immaterial, and that the ultimate question to be determined by the court and the ultimate question which is of interest to the court is simply the question as to how the financial relations were regulated, regarded, and treated as between the four brothers. Therefore the defendants deem it unnecessary to encumber the record in this case with the books of original entry and with the evidences of original entry, of the items that were charged here and there in the personal accounts of Fleming Bros. and of the individual brothers. All of the books of account, including the books of original entry, are here in the court room, accessible and subject to the examination of the plaintiff and of the defendants, and it is proposed by the defendants to offer in evidence certain summaries or statements taken from the books, largely for the purpose of illustrating to the court the method of bookkeeping and of accounting as between the four brothers, Robert, John, Charles, and Stanhope, and the defendants expect to offer these summaries after identifying them properly, understanding that this method of proof will be acceptable to counsel for the plaintiff.

Mr. Mills: That is true, reserving the right to go into any of the books for the purpose of checking the summaries. No objection to that sort of an offer.

Mr. Miller: I may further say for the sake of the record and the enlightenment of the court that the defendants have caused subpoenas to be served upon something more than a half a dozen of witnesses who from time to time acted as bookkeepers for Fleming Bros.,

and that those witnesses are persons who made original entries

62 and did the posting in keeping the books of Fleming Bros.,

but that in view of the foregoing statement and of the concession of counsel for the plaintiff, it is not now proposed to call those witnesses to the stand, but defendants propose to call to the stand Miss A. E. End, the present bookkeeper of Fleming Bros., and to identify so far as may be necessary all books of account by her.

Mr. Parsons: That is agreeable, but of course if we want to ask Miss End anything about it she will point it out to us, and that is all we care for.

Miss ADDIE E. END, being sworn, testified on the part of the defendants:

Direct examination.

By W. E. Miller:

I live in Des Moines. Am in the employ of Fleming Bros. as bookkeeper, and have been so employed since the 17th or 18th of February, 1910. Have had charge of the books kept by Fleming Brothers, Incorporated, and Fleming Bros., including the insurance accounts, and all other books of account kept so far as the brothers Fleming are concerned, and have been doing this since the date mentioned in 1910.

Since the commencement of this suit which is now on trial, I have examined and familiarized myself with the books of account of the Fleming Bros. kept in years previous to the time I became book-keeper; have investigated all of the books of account now in their possession and familiarized myself with them. These books of account run back to about the year 1888, the Dubuque books back in 1888. There is a continuous series of account books, ledgers, 63 journals, cash books, and the usual paraphernalia of book-keeping, reaching back to that time and I have gone through every one of them.

I have examined into the question as to how the personal items of the four brothers were entered upon the books. I have examined into the question of how the funds of the "brotherhood," as it may be called, have passed from the joint fund into the hands of the individual members. Have examined into the question as to how the dependent members of the Fleming family have derived their funds from the same common source, and the method by which the personal expenditures of the four brothers were taken care of as a matter of bookkeeping. I have examined into the question as to what was done in the way of accounting for funds turned over to Mrs. Robert Fleming and to the mother and sister of the four brothers and to Mrs. Charles Fleming. In other words, I have thoroughly familiarized myself with the internal financial history of the various members of the Fleming family group as shown on these books from some time in 1888 down to the present time. I know how their banking has been done.

There never has been an individual banking account kept by any of the four brothers except two years ago for convenience during the summer months we deposited a Fleming Bros. check in a bank at Spirit Lake for Mrs. Fleming to draw upon while she was running the cottage during the summer and for convenience she signed checks "R. J. Fleming," and then in the fall that was all charged off in the Okoboji House Account and finally goes into the Profit and Loss, and that account is closed out.

I think Mr. R. J. at one time had a separate deposit of 64 political funds, but the account of that was kept in a separate set of books.

Q. When he was helping to save the country?

A. Yes.

But that had nothing to do with the individual interest or the property interests of any member of the firm and the items were not entered upon the books of Fleming Bros., nor of Fleming Brothers, Incorporated.

At no time during my acquaintance with the brothers did Charles Fleming have an individual bank account nor did any of the others, and in my investigation of the books kept prior to my active connection with it, I have never discovered any evidence that any of the individual members of the brotherhood maintained at any time an individual bank account. All of the checks I find were signed, "Fleming Bros., General Agents," or "Fleming Bros., Managers," or

just "Fleming Bros." The appellation of "Managers," or "General Agents," had to do with their insurance business. They were either managers or general agents for the Insurance Company.

My examination into all of the books shows that all items of house rent have gone into a "House Account," and at stated times have been charged off to "Profit and Loss." There have been periods of time during which certain members occupied rented houses. I find on the books that up to 1896 all house rents went into one general house account called, "House," and then at a stated time, that went off to "Profit and Loss," but in December, 1896, there seems to have been a little separation as I find "Charles Fleming House,"
65 and "R. J. Fleming House," and then the House account that seems to be the mother's. It said, "Mrs. Jane," and these accounts were all charged off to Profit and Loss.

Q. Now, what would be the character of the items that would enter into, we will say, the John Fleming House Account?

A. There would be the rent, the groceries, and the money that was given his mother or his sister, meat bills, and things like that.

And that would be entered on the debit side of that House Account and at the end of a stated period, those debit items would be footed and that footing carried into Profit and Loss.

Q. Now, state whether or not the same thing obtained in the House Account of Charles Fleming.

A. It did.

Entering into the Charles Fleming House Account there would be house rent, groceries, meat bills, ice, telephone, and the currency or checks which Mrs. Fleming had, and at stated periods that would be footed and the footing charged off to Profit and Loss, and in charging these items to Profit and Loss that disposed of them so far as the process of bookkeeping was concerned.

Q. Now, did the same practice obtain with reference to Robert Fleming in his household?

A. The same.

Q. How was Mr. Stanhope's end of the matter handled?

66 A. Well, we have an account that is just "Stanhope Fleming" or "S. Fleming," and his hotel bills and the checks which he drew for his personal use are charged into that account, and at stated intervals go off to Profit and Loss.

Mr. Stanhope for a number of years prior to July, 1916, spent most of his time in Omaha. He did not maintain a household, being an unmarried man, but his board bills, and personal expenses would come in and be charged in the account of "Stanhope Fleming Personal," including traveling expenses and the like of that, and at stated intervals the debit side would be footed and the total carried into Profit and Loss.

Q. Now take these personal accounts and House Accounts, of all of the four brothers, what appeared on the credit side of them?

A. Well, not anything, except once in a great while if we would charge something to one of them or to one of the house accounts, and perhaps it would come back you know, that they did not use

it, or the check was not used, then that would come as a credit. I remember one instance. They were getting quite a quantity of meat and some of the meat was sold to one of the girls in the office, and that was all charged I think to Mr. John's house account, and then the credit for the meat which this girl took was given. That would be all the credit except the Profit and Loss item.

Q. That is what I want to get at. As a general proposition and with but few exceptions, as I understand you, the only credit item in any of these personal accounts would simply be the Profit and Loss item?

A. Yes.

Q. Which was the exact equivalent of the amount charged up on the debit side?

A. That is it.

Q. And that balanced the account?

A. That balances the account.

67 From time to time, Mrs. Robert Fleming would obtain funds at the office on a check which would be signed, "Fleming Bros." If one of the men were there to sign it, we would have it signed, if not, we had funds in the cash box and we would cash a check for her and have the check signed later on, then the amount of it would be charged to "R. J. Fleming House Account." I know of instances where Charles Fleming, for example, would sign a check in favor of Mrs. R. J. Fleming. He would sign "Fleming Bros." and John Fleming the same way, and Hope if he happened to be there, just the same, and the checks would be charged to the House account. We would do the same way with Mrs. Charles Fleming and the checks on which she got money were charged in the "Charles Fleming House Account" and would then go into Profit and Loss.

I know about the brothers carrying insurance on the lives of each. There was a series of policies on the life of Robert and a series on the life of John, and another series on the life of Stanhope, and another series on the life of Charles. The premiums on all the policies were paid by Fleming Bros. Since my time we have what is called, "Fleming Bros. Insurance Account," and the premiums were charged to that, but I have found in going through the old books that through a couple of years these premiums went into just a general expense account and that went off to Profit and Loss just the same as our insurance account does. Whether the premiums were charged in an insurance account or in an expense account they went off into Profit and Loss and in that way we got the balance on our books.

68 I never in my experience in bookkeeping for Fleming Bros. at any time ever carried to the credit of Robert Fleming any earnings as salary, dividend, or anything of that sort, nor have I carried any such item or items to the credit of any one of the four brothers. The only instances I have been able to find where any of the four brothers has been credited with anything in the way of earnings, salaries, dividends, or anything of that sort is that in the older ledgers, I find an account called, "R. J. Fleming, Renewals," and "Charles Fleming, Renewals," and "John Fleming, Renewals," and that went off to Profit and Loss. That represented

the renewals on their insurance work on premiums that were paid in but it was disposed of as a Profit and Loss item.

I have never ascertained or located anything in the nature of a balance sheet as between the four brothers. I have never found anything like a trial balance between the four brothers. There is nothing on the books showing or tending to show that at any time throughout the entire history of these books of account twenty-eight years, or such a matter, any balance has ever been struck between the four brothers, or any of them.

Q. If you were to go at — today, Miss End, as a bookkeeper to determine which brother had drawn the greater amount of funds from Fleming Bros., how would you do it?

A. Well, I would have to go back and pick out from all of these accounts what each one had had, and in some places that would be hard to do because in some of the accounts it just says, "Cash," and does not show to whom it went.

I have never been able to discover on the books any trial balance
 69 or anything indicating any division or attempted division as between the brothers, or as between any other members of the family group. I have never been able to discover anything on the books indicating any attempt at an equalization as between the brothers. I cannot tell from the books whether R. J. Fleming has drawn more than John, nor whether Stanhope has drawn more or less than Charles. I could not make any comparison on the face of the books as between the relative drawings of the four brothers. I would have to go back and pick out from all of these old accounts,—pick out every entry and determine as best I could what was meant by some of those cash items.

Q. Now, on the other hand, have you any means of determining from those books how much John Fleming, for example, has earned for the firm?

A. No.

Q. Or any other member?

A. No.

Q. You have no means of determining whether John or Charles or Robert or Stanhope, or any one of them earned more or less than the other?

A. No, I have no way.

There are no credit items to guide me in that—not a thing.

In later years there is what is called a "Fleming Bros. Personal Account," which is a different thing from the John A. Fleming Personal Account or the Charles Fleming Personal Account, etc. It was a sort of general Fleming Bros. personal account. Into this account went items which were not easily divided between the brothers, such as gifts which they gave, flowers and things like that, Christmas gifts, doctor bills, music boxes, traveling expenses, funeral expenses of the mother and sister and of Mr. Charles. The rail-
 70 road expenses for the ladies or dependent members of the family often went into that account. If those items did not

go in there, it was a mistake on the part of us who were keeping the books. I understand the word "dependent" members refers merely to the non-producing members of the family. In this Fleming Bros. Personal Account, appear items such as, for instance, "Grommes & Ulrich," cigar bills, some clothing.

When I came into the office they were just running this Fleming Bros. Personal Account and into that went all of the clothing. But Mr. R. J. would come out and ask when he got three or four shirts and from whom he got them, and I would have to dig through this whole account and find the item. So we decided for convenience in our work that we would separate it as much as we could, and that is what we have been trying to do these later years. When one man got clothing or anything like that we tried to put it to his personal account.

The footing of this Fleming Bros. Personal Account goes to Profit and Loss.

I recall that for a time the three households of R. J., Charles, and John, all occupied places in the Chamberlain flats. The rents for all three were paid to Lowell Chamberlain in one check each month.

When I first came into the business Mr. John's household consisted of himself, his sister, and Mrs. Bulger, and Stanhope stayed there when he would be in Des Moines. Mr. Charles' household consisted of himself and his wife, and Robert's household consisted of himself and his wife and two children.

71 & 72 There was never any distribution as between the brothers of any profit and loss balance at any time throughout the history of this bookkeeping.

73 & 74 I never had any instructions from any of the brothers placing any limit upon the amount which should be turned over to the plaintiff or to Mrs. Robert Fleming or to any other of the dependent members of the family, as I have called them. We have invariably furnished the ladies with what they asked for.

75 Cross-examination.

By J. M. Parsons:

The checks payable to Mrs. Charles Fleming about which I have testified found their way into the Profit and Loss account finally. They were charged up to the House account of Charles Fleming and then charged off as I testified and they also appear as part of the summary of these exhibits which include the entire Profit and Loss account of Fleming Bros. from 1887 and 1888, and on. The same thing would be true as to the method and manner of disposing of checks issued to any other member of the Fleming family. For instance: if Robert's wife would get a check, that would be charged to the house account of Robert Fleming. The checks in favor of Robert Fleming's children we have been charging separately for convenience in their banking. We have been supplying Robert's children with checks of the corporation. It was simply for convenience in banking, but all the other expenses of Robert, outside

of what was paid to the children, would go into the Robert Fleming House account.

This Church and Lodge account always went into Profit and Loss. It was simply a separate account kept there by the bookkeepers for their own convenience so as to be able to find these items when any of them were inquired about. That also was just the reason for finally separating the accounts of the different brothers. If Robert wanted to find out when he bought some shirts, I could go to his account and find it without looking over the balance of the accounts. It was all merely a bookkeeping convenience. This Church, Lodge, and Club account was simply another source of getting the expenditures into the Profit and Loss account.

I also kept the books of Fleming Brothers, Incorporated.
76 There, we have these different expense accounts. Our janitors and supplies, and things like that all go off to the Profit and Loss of the corporation. If there is a general balance, that must stand there.

I do not believe we have a balance. It is cash and just carried on. There were no dividends ever declared.

Q. So it does not go into the partnership?

A. There is no partnership.

Q. What I mean is, it does not go into the books of Fleming Bros.?

A. No.

On the corporation's books there is a salary account. We simply have an account which we credit as "Fleming Bros. Salary."

Q. Is there not a corresponding entry made on Fleming Bros.?

A. No, we charge against this Fleming Bros. account the interest which we pay on money which we have to borrow to keep the thing going and various little items like that.

Q. The interest that the corporation borrows?

A. Well the Fleming brothers borrow it.

Q. The interest of the Fleming brothers?

A. We have made certain rules to simplify our bookkeeping. Every bit of interest we pay, we pay with the Fleming Brothers, Incorporated check whether they borrow it or not, so at the end of the year there would be money borrowed by Fleming Bros. and the check of Fleming Brothers, Incorporated would be charged against it and the salary account is run to offset that.

Now, as to this account of salaries paid the Fleming brothers by the Insurance Company, when they were on a salary there was no attempt at separation of the amounts earned by the different
77 brothers. All of the salaries went into one account and found their way into Profit and Loss.

78 There was no exact stated time when these personal accounts of Fleming Bros. and House accounts, etc., were charged off. It was sometimes six months and sometimes a year. In one instance I noticed it ran about three years and at another time they were charged off every three months, but eventually these

things all found places in the Profit and Loss account. They would be charged to the debit side of the Profit and Loss account. Anything that came in that was profit would be charged on the credit side and the outlay would be charged on the debit side.

79 & 80 ROBERT J. FLEMING, one of the defendants, testified as follows:

Examined by W. E. Miller:

I was sixty years old September 2, 1916. Am a brother of John and Stanhope Fleming who are also defendants here. Am president of Fleming Brothers, Incorporated.

I am and for years have been a member of the brotherhood or aggregation known as "Fleming Bros." My brother, Charles Fleming, was a member of that group during his lifetime. He died January 15, 1916.

81-83 After our father died we conducted our financial relations in the family exactly the same. We ran that business under the style, George G. Mead, survivor of himself and Stanhope Fleming, until some time in '84 when a partnership was made. Failure was very certain and a man who was a considerable creditor came in and a new firm was made called Grimes & Flemings. Each of the Flemings were taken in, indeed my mother and sister, all except Stanhope whom we call Hope.—he was not of age and was not a party to that partnership. Mr. Grimes took the place of Mr. Mead giving us a contract, I think, that we were to pay the debt that was owed him, if I remember correctly, and interest on it, and any money that he would necessarily invest up to five years. If we did not do that in five years, why then he was to have half of the property.

That business failed the next year, 1885. They had built good mills all around us and changed the old burr mill into roller mills and our business was very much affected by that. We wound up a little of that business within the last few years and paid them. We have been paying them in every quarter that we have lived in since. During that time my brother, Charles Fleming, was not engaged in any other line of business. We were all engaged in the same business and got our living through the same fund or source and never had an account between each other.

My brother Charles was married January 2, 1881 to the plaintiff in this case.

84 Q. What agreement did you have during all these years down to and including the year 1896 with your brothers, John and Stanhope, in reference to what would occur and how the property should be disposed of in the event of the death of any one of you?

Objected to as immaterial and incompetent.

A. Why, the arrangement was that we all worked together and we had what we needed to live on when we had it and we pooled the

whole thing and when I should die then the other three would have it and when another one would die, and so on until the last Fleming would have it all.

Q. You may state whether or not during all those years down to and including 1896 your brother Charles was engaged in any business with any one else except you three brothers?

A. Never for an hour of his life.

Mr. Parsons: The question *proceeding* the last one, I wish to add to the objection I made, "and move to strike it out on the ground that it is incompetent and in the light of the last question and answer, the witness is incompetent to testify thereto under the statute."

85-87 At the time these contracts, exhibits 101 and 102, were made, none of the four brothers owned real estate, and the four of us did not have title to any real estate which has not since been disposed of.

88 Exhibit 104 is a contract between the Massachusetts Mutual Life Insurance Company of Springfield, Massachusetts, and Robert J., Charles, and John Fleming of Des Moines and Stanhope Fleming of Omaha, Nebraska, bearing date August 1, 1908. I recognize the name "Charles Fleming," attached thereto as the genuine signature of my brother, Charles Fleming. It also bears the genuine signature of Stanhope, John A., and myself. That is the contract under which the Fleming Bros. have represented the Massachusetts Mutual Insurance Company as its general agents. The contract has been in force continuously from August 1, 1908, except some modifications as to the territory.

Defendants now offer and read in evidence.

EXHIBIT 104 TO TESTIMONY OF ROBT. J. FLEMING

Objected to by the plaintiff as immaterial and incompetent.
The contract recites the duties of the agents in

§ 1. That said Company hereby appoints the said Flemings, as such general agents to solicit applications for life insurance
89 & 90 in said Company, to collect and pay over premiums, etc., etc., devoting their time to the business of the company, etc.

§ 2. That said General Agents may, personally and by agents in their employ, solicit applications for insurance in said Company in the following territory: The States of Iowa and Nebraska; with headquarters in Des Moines aforesaid; also the State of Wyoming. * * *

§ 3. That if said General Agents shall employ other persons to solicit applications for insurance, or in any other capacity in connection with their agency, they shall be responsible to said company for all matters entrusted to such persons. * * *

§ 4. contains a schedule of commissions.

§§ 5 to 12 relate to reservations, collection fees, changes in rates of commissions, commissions on changed policies, commissions on

transferred collections, post-termination commissions, sub-agents' commissions, deposits, reports, etc.

§ 13 fixes allowances for office rent, traveling expenses, etc.

§ 14 provides for renewal commissions.

§ 15. That the death or withdrawal of one or more of the members of said firm leaving one or more of them surviving, shall not terminate this contract, which shall continue in force subject to all of its provisions; it being agreed, however, that all of the commission or other rights of deceased or withdrawn members of said firm shall pass to the surviving member or members, anything in this contract to the contrary notwithstanding.

§§ 16-25 contain other provisions immaterial in this case.

In witness whereof, the parties to this contract have subscribed the same in duplicate, the day and year first above written.

Massachusetts Mutual Life Insurance Company,

Massachusetts Mutual Life Insurance Company, By John A. Hall, Pres. Robert J. Fleming. Charles Fleming. John A. Fleming. Stanhope Fleming.

91 This stock book of Fleming Brothers, Incorporated contains a series of stock certificates, cancelled. The cancelled certificates were those which had been issued to and carried in the names of the four Fleming brothers up to the time of Charles' death. On or about April 12, 1916, these certificates were cancelled and a similar amount issued in lieu thereof to R. J. Fleming, John A. Fleming, and Stanhope Fleming or the survivors or survivor of them. There is a series of them, the first one is No. 65 and the last one No. 96. On the back of each certificate is an assignment in blank. This assignment on the back of 65 bears my signature; also 69, 70, 71, 72, 73, 74, and 93. Those are all my signatures. These assignments on 65, 69, 70, 71, 72, 73, and 74 were all executed by me December 1, 1906. The assignment on certificate No. 93 was executed by me November 30, 1914.

The defendants now offer and read in evidence stock certificate No. 65 which reads as follows:

"Incorporated under the laws of the State of Iowa. No. 65. Shares 104. Fleming Brothers Incorporated Des Moines, Iowa. This certifies that Robert J. Fleming is the owner of 104 shares of \$100 each of the capital stock of Fleming Brothers Incorporated. Transferable only on the books of the corporation by the holder hereof in person or by attorney upon surrender of this certificate properly endorsed. This stock is fully paid and non-assessable.

In witness whereof the said Corporation has caused this certificate to be signed by its duly authorized officers and to be sealed with the seal of the corporation this first day of December, A. D. 1906.

(Signed) Robert J. Fleming, President, John A. Fleming, Secretary. (Corporate seal.)
Fleming Brothers, Incorporated."

And on the back of the certificate the assignment in blank reads as follows:

“For value received — hereby sell, assign and transfer unto — — shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint — — to transfer the said stock on the books of the within named corporation with full power of substitution in the premises. Dated — 93 —, 19—. Robert J. Fleming. (And at the left hand corner.) In presence of Katherine D. Ives.”

STIPULATION

It is conceded by the plaintiff at the request of the defendants that certificate 69 for 500 shares, and certificate No. 70 for 500 shares, and certificate 71 for 50 shares, and certificate 72 for 50 shares, and certificate 73 for 30 shares, and certificate 74 for 16 shares making a total of 1,250 shares are identical in form and in date and in form of assignment with certificate No. 65. The 1,250 shares mentioned being inclusive of certificate 65.

Witness resumes: Stock certificate No. 66 in this same book was issued to Charles Fleming and was dated and assigned in blank the same day, December 1, 1906.

I recognize the name of Charles Fleming as it appears on the back of certificate No. 66 as being the genuine signature of my deceased brother, Charles Fleming. The same is true as to certificates 75, 76, 77, 78, 79, and 80. That makes 1,250 shares.

STIPULATION

It is agreed that certificates 66, 75, 76, 77, 78, 79, and 80 all bear date December 1, 1906, and that they are in form identical with the certificate No. 65 already read into the record and that the form of assignment on the back of each is identical therewith.

Witness resumes: Certificate No. 94 is in the name of Charles Fleming for 1,250 shares dated November 30, 1914. That is the date of the issue and the date of the assignment. The assignment 94 bears the genuine signature of Charles Fleming.

STIPULATION

It is conceded that certificate No. 94 and the assignment on the back thereof are in the same form as No. 65 heretofore set out.

Witness resumes: Certificate No. 67 for 104 shares is in the name of Stanhope Fleming dated December 1, 1906, and assigned by Stanhope Fleming. I recognize the signature of Stanhope Fleming on the assignment on the back of the certificate No. 67 also on No. 81 for 500 shares and on 82 for 500 shares and on 83 for 50 shares and on 84

for 50 shares and on 85 for 30 shares and 86 for 16 shares, all issued to Stanhope Fleming and all assigned by him in blank.

STIPULATION

It is conceded that certificates Nos. 67, 81, 82, 83, 84, and 86 issued to Stanhope Fleming are identical in form with the assignment on the face of certificate 65 which is already spread in the record.

Witness resumes: Certificate No. 95 is in the name of Stanhope Fleming dated November 30, 1914, for 1,250 shares. I recognize the genuine signature of Stanhope Fleming on the back.

95

STIPULATION

That certificate is conceded to be in the same form on the face and as to the assignment as certificate No. 65 which is spread in the record.

Witness resumes: Certificate No. 68 for 104 shares, No. 87 for 500 shares, No. 88 for 500 shares, No. 89 for 50 shares, No. 90 for 50 shares, and No. 91 for 30 shares and No. 92 for 16 shares all dated December 1, 1906, are issued to John A. Fleming and assigned in blank by him the same date, the assignment bearing his genuine signature. No. 96 is for 1,250 shares issued to John A. Fleming dated November 30, 1914, assigned the same date, the assignment bearing the genuine signature of John A. Fleming.

STIPULATION

It is conceded that certificates No. 68, 87, 88, 89, 90, 91, 92, and 93, issued to John A. Fleming are identical on the face and as to the form of assignment with certificate No. 65 which has been spread upon the record, and that they bear the genuine signature of John A. Fleming wherever it appears upon those certificates.

Witness resumes: Certificate No. 93 issued to me for 1,250 shares was assigned the same day.

After these certificates of stock had been issued to me and had been assigned in blank by me, I placed them in a common receptacle where all of this stock was placed, where they could be found. I recognize the envelope, exhibit 110, as being the one which always contained the first issue of certificates and I recognize exhibit 111 as an envelope that contained the issue of November 30, 1914, of 1,250 shares to each of us and this was deposited in with the others in that first envelope.

Right after the certificates, Nos. 66, 75, 76, 77, 78, 79, and 80 had been issued to Charles Fleming, I observed that they were enclosed in and filed in and deposited in this envelope, exhibit 110. The same thing is true as to the certificates which have been issued in the names of myself and John and Stanhope. The entire 5,000 shares issued back in 1906 I know have been contained in this large envelope, exhibit 110. I have seen them in that envelope many times since. They continued in that envelope until they were can-

cancelled subsequently to the death of our brother. They were cancelled on April 12, 1916. It is a fact that all of these certificates which had been issued to my brother Charles were at the time of his death contained in this envelope, 110, together with all of the rest of the certificates.

Immediately after certificate No. 94 for 1,250 shares had been issued to Charles Fleming on or about November 30, 1914, I observed it in this envelope, exhibit 111. This was immediately after its issue and the issue of all of the other three certificates. The same was true in regard to No. 93 issued to R. J. Fleming, No. 95 issued to Stanhope Fleming, and 96 to John A. Fleming. They were immediately put in that envelope with Charlie's certificate. They remained in that envelope. At the time of the death of Charles Fleming all of those certificates including No. 94 were in that same envelope.

97 During the first year after these certificates were issued the envelope containing them was kept in a safe that was owned by the Mutual Life Insurance Company. After giving up our agency for that company and commencing with the Massachusetts Mutual, we bought a safe and the certificates have been in a box in that safe ever since. The box contained the stock and stockbook and the minute book of the meetings of Fleming Brothers, Incorporated, and of another organization in which we were part owners.

All four of us brothers at all times had access to that receptacle and to these envelopes and to the stock certificates which they contained. We always had access to it, in fact I think that drawer that contained them never was locked.

Q. Mr. Fleming, what was your purpose and your object in assigning your certificates of stock in blank and in enclosing them in these envelopes, exhibits 110 and 111?

Objected to as immaterial.

A. I did it to deliver the stock to the survivors of this survivorship contract arrangement.

My brothers and I took advice on the subject at or about the time the thing was done. We were all together. It was done when the first stock was issued. I think we consulted Mr. Guernsey. He drew up the papers merging The City Real Estate Company or changing its name to Fleming Brothers, Incorporated. At that time The City Real Estate Company stopped and its stock was cancelled and this new stock was issued. I know that my brothers, John and Stanhope, endorsed their certificates of stock in blank and deposited them in this envelope for the same purpose and pursuant to the same advice.

98 Q. Do you know of any reason other or different from that which controlled your own action which caused your brother Charles' stock to be deposited in these envelopes and kept in the same way as your own?

Objected to as immaterial and for the further reason that it is not competent, and again the witness is not competent to testify, in-

cluding as it may communications between the witness and the deceased under section 4604 of the code.

Q. In my question, Mr. Fleming, I am expecting you to exclude any conversation or transaction which you had with your brother Charles.

Same objections.

A. I know there was no other reason.

Defendants offer and read in evidence exhibits 110 and 111 and the endorsements or engrossments thereon, as follows:

EXHIBIT 110 TO TESTIMONY OF ROBT. J. FLEMING

being a manilla envelope 4 $\frac{3}{4}$ by 10 $\frac{1}{4}$ on which is endorsed the following:

99

Stock Certificates

Fleming Brothers, Incorporated

R. J. F.	#65	—	104	
	69	—	500	
	70	—	500	
	71	—	50	
	72	—	50	
	73	—	30	
	74	—	16	
				1,250
Chas.	#66	—	104	
	75	—	500	
	76	—	500	
	77	—	50	
	78	—	50	
	79	—	30	
	80	—	16	
				1,250
Stanhope	#67	—	104	
	81	—	500	
	82	—	500	
	83	—	50	
	84	—	50	
	85	—	30	
	86	—	16	
				1,250
J. A.	#68	—	104	
	87	—	500	
	88	—	500	
	89	—	50	
	90	—	50	
	91	—	30	
	92	—	16	
				1,250

100 EXHIBIT 111 TO TESTIMONY OF ROBT. J. FLEMING

being a white envelope $4\frac{1}{8}$ x $9\frac{1}{2}$ bearing the following:

Return in 3 days to
Fleming Bros.,
Des Moines, Iowa.

(Cut of Fleming
Building.)

Certificates of Stock, Fleming
Brothers, Incorporated,
No. 93, R. J. Fleming, 1250.
94, Charles Fleming, 1250.
95, Stanhope Fleming, 1250.
96, John A. Fleming, 1250.
Issued November 30, 1914.

Cross-examination.

By J. M. Parsons:

This stockbook about which I have been testifying is the book of the certificates of shares of the Fleming Brothers, Incorporated. I don't know why the certificates began with No. 65 unless that was the consecutive number after The City Real Estate stock. I think that at the time of the death of Charles Fleming certificates No. 65 to 96, both inclusive, were all of them outstanding certificates of stock.

Across the face of the certificate, No. 65, there is endorsed in red ink the following:

"April 12, 1916. Certificates Nos. 65, 66, 67, 68, 74, 79, 80, 85, 86, 91 and 92, cancelled and re-issued and included in Certificates Nos. 108, 110, 111, 112, 113, 114, 115, 116, 117, and 118. John A. Fleming, Secretary."

I knew of that endorsement at the time it was made. It was on that date, April 12, 1916. There is the same endorsement in red ink on No. 66 except as to the numbers of the certificates enumerated.

101 As a part of the cross-examination, the plaintiff reads in evidence the following endorsement in red ink on the face of Certificate No. 66:

"April 12, 1916, Certificate- Nos. 65, 66, 67, 68, 74, 79, 80, 85, 86, 91, and 92, cancelled and re-issued and included in Nos. 108, 110, 111, 112, 113, 114, 115, 116, 117, and 118. John A. Fleming, Secretary."

That is a certificate that had been issued to Charles Fleming. The sum and substance of the matter is that these certificates, Nos. 65 to 96, inclusive, were all taken up and cancelled on the 12th day of April, 1916, and their place taken by a reissue of stock in the names of the three survivors, and this stock was issued in certificates 97 to 118, both inclusive.

Certificate 97 is for 6000 shares issued to Robert J. Fleming, John A. Fleming, and Stanhope Fleming, or the survivors or survivor of

them jointly and not as tenants in common, dated April 12, 1916. All of these certificates that were issued, Nos. 97 to 118 both inclusive, are phrased in the same way and the stubs of all of them read the same way.

All of the stock in Fleming Brothers, Incorporated, that had been issued was issued one-fourth to myself, one-fourth to Charles, one-fourth to Stanhope, and one-fourth to John A. prior to this last issue we have been talking about, and this last issue of April 12, 1916, was made to take up and cancel all the former issues.

All of the certificates, Nos. 65 to 96 inclusive were placed in this envelope, exhibit 110, and the endorsement thereon was to show what the envelope contained. The endorsement opposite the initials, "R. J. F." shows the numbers of the certificates and the number of shares in each and the same is true of the other names, Charles, John, and Stanhope as endorsed thereon. This later issue of certificates Nos. 93, 94, 95, and 96, were placed in another envelope with practically the same endorsement and these all remained there in the safe of Fleming Bros. They might have been taken out a half a dozen times a year but, if so, they were put back in the drawer that contained that stuff. That drawer was their resting place and if they were out of it at all, it would be simply for some temporary purpose.

103 & 104 Redirect examination.

By W. E. Miller:

There were no bank stocks outstanding in the name of Charles Fleming at the time of his death. The bank stocks enumerated in this balance sheet, whether standing in the name of myself, John, or Hope, belonged to Fleming Bros., or to the survivors or survivor of them. They were all paid for with the funds of Fleming Bros. and were all carried on the books of Fleming Bros. regardless of the individual name in which they may stand.

Recross-examination.

By Mr. Parsons:

I do not think any of these bank stocks ever stood in the name of Charles Fleming. They were transactions that happened here and Charlie might not have been here. I do not think a dollar of any of these stocks other than the Fleming Brothers, Incorporated, ever stood in Charlie's name.

We speak of Fleming B-r-o-s. to distinguish it from the corporation, the name of which is "Fleming B-r-o-t-h-e-r-s, Incorporated."

105 Miss KATHARINE D. IVES, sworn and examined on behalf of the defendants:

I live in Des Moines at Tenth and Des Moines Streets. Am in the employ of Fleming Bros. and have been for over seventeen years.

Q. I hand you, Miss Ives, the stock book of Fleming Brothers, Incorporated, which is recognized as such in this case, and ask you to look at certificates of stock—I will say cancelled certificates 106 & 107 certificates of stock numbered from 65 to 92, both inclusive, and ask you to look particularly at the names of the four Fleming brothers appearing upon the back of these certificates, and at the name "Katherine D. Ives," as it appears there as a witness, and ask you to state whether or not the names of the brothers were signed there in your presence? You can run through them one by one.

A. I witnessed all those signatures.

Q. I call your attention also, Miss Ives, to certificates numbered 93 to 96 both inclusive, and ask you if they bear your signature as witness, and whether you saw the assignments on the back of them signed by the persons named? That is, respectively by John A. Fleming, Charles Fleming, Robert J. Fleming, and Stanhope Fleming?

A. Yes, sir; I witnessed those signatures.

I have many times seen each of the four brothers sign his name and I recognize those signatures which I have witnessed as being the genuine signatures of each of the four brothers.

I know that these certificates of stock were always kept in the safe. All of the certificates issued to all of the four brothers were always kept together.

The dates on the stock certificates would show about the time I witnessed their several signatures. It was years ago,—long before the death of Charles Fleming.

The assignments on the stock certificates, 93 to 96, were made about the time the stock certificates were issued. All of the four certificates were kept in the safe. I have seen them there many times myself from time to time.

I recognize this envelope, exhibit 110. It has been in the safe for years. All of these certificates of stock were kept in that envelope. I also recognize the envelope, exhibit 111. That also has been in the safe.

108 Miss ADDIE E. END recalled on behalf of the defendants:

Examined by W. E. Miller:

I know that the writing on the envelope, exhibit 110, is the handwriting of Miss Foss. I also know that this was the envelope in which the stock certificates were kept and that this envelope was kept in the safe. I also know that the envelope, exhibit 111, is the one in which the four shares—the last stock that was issued, were kept. They were kept there prior to the death of Charles Fleming. The envelopes were kept in one of the drawers in the safe where I would run into it. That drawer was not locked, and all of the brothers had access to it. That drawer contained both of these envelopes with their contents. That has been true ever since I have been employed there and continued to the time of the death of Mr. Charles Fleming. It was February of

1910 that I went to work there and these envelopes containing the stock certificates continued to be in that drawer to my knowledge up to the time that the stock was reissued.

112 JOHN A. FLEMING, one of the defendants, testified as follows:

Examined by Mr. W. E. Miller:

Am fifty-four years of age. Single. Robert J. and Stanhope Fleming are my brothers. Charles Fleming was in his lifetime.

113 Q. When was the first knowledge you had, Mr. Fleming, of the idea which you say obtained among you of keeping all of the funds in one account and spending from that joint account for the family needs?

A. The idea was inculcated in us by our father and mother. I don't know when it did begin. We began when we were 114 children working with our father about this mill without any pay or thought of pay. We got what money we needed and he bought our clothing, or our mother did when she did not make it. That was the way we got along in childhood, the same as we have since.

I have never known of or operated under any different arrangement than that up to the present time.

None of my brothers ever owed me anything. I have never owed any of my brothers anything. There never has been any attempt at a partition or division of money of any sort between us brothers.

I have heard the testimony of Miss End and Miss Foss, the bookkeepers. Most of my personal expenditures are charged up to J. A. Fleming, personal account, but I don't imagine all of them are. I think I got a great deal of my expenses from my brothers and Charlie did in his lifetime. The J. A. Fleming house account is for our home. It was my mother's home and my sister's 115 home and now my brother Stanhope and myself and our cousin, Mrs. Bulger, live there.

I am familiar with what is called the Fleming Bros. Personal Account on our books and am and have been cognizant of its contents. Well, I don't know the reason that dictated the division of these items of expense into these several accounts which have been shown here in the evidence. I could not state any particular reason for it except the bookkeeper separated them and this Fleming Bros. Personal Account has our clothing and all presents and anything that is a little unusual like Christmas presents and trips away. There are a good many items in it but they are a little different from our personal account or our house expense. No attempt has ever been made to reconcile these various accounts or to discover anything about their relative equality or inequality between the four brothers. No such distinction or difference has been made.

Q. Have you at this moment, Mr. Fleming, even as the result of all your investigations in this case, have you at this moment any idea as to the relative amounts that have been drawn by the four brothers during all of the years of your association?

A. I have not, no sir, and I would not know what any of them had drawn today excepting for this suit. We began to check it up, and I would not have been able to tell within a thousand dollars of any one's account, I am sure, in one year.

Q. Are you interested in or concerned in that inquiry at all personally?

A. No, sir.

I am perfectly familiar with the stock book of Fleming Brothers, Incorporated, and all of the certificates of stock which have
116 been issued and cancelled and which are attached there. I am the Secretary of Fleming Brothers, Incorporated, and have been since that name was adopted. The cancelled certificates, Nos. 65 to 92, both inclusive, were issued on or about the date they bear, December 1, 1906, and at the same time were endorsed by each one of us and filed away in a drawer in the safe. I am familiar with the signatures attached to the various assignments on all of these certificates. I have seen my brother Charles write and sign his name many times. I recognize as genuine his signature there on certificates Nos. 66, 75, 76, 77, 78, 79, and 80. Those are his genuine signature. I also recognize as genuine the signatures of my brothers, Robert J. and Stanhope, as they appear on these certificates of stock. They are all genuine. Mine were signed at or about the time of the issuance of the certificates, and I know that my brothers, Robert J. and Stanhope did the same. On the same day I saw the certificates, issued to my brother Charles and bearing his signature to the assignment, had been placed in this same envelope, exhibit 110. And I suppose I have seen them weekly ever since. All four sets of certificates were in this envelope. And it was kept in a drawer in a safe. I think there was a lock on that drawer but it has not been locked. The keys are hanging in it today as they always have. All four brothers had access to that drawer at all times since the stock was originally deposited there.

Certificates of stock Nos. 93, 94, 95, and 96, are dated November 30, 1914, and were issued about that date. No. 96 is endorsed by John A. Fleming, 95 is made out to Stanhope Fleming, and by him
117 & 118 endorsed, 94 made to my brother Charles, and I recognize as genuine his signature on the back of it. I endorsed certificate 96 when it was made and put it in an envelope with the rest of them in the safe. R. J.'s certificate and Stanhope's were endorsed the same way at the same time. I always saw certificate No. 94 issued to Charles Fleming and bearing his signature in that envelope, exhibit 111. That envelope, exhibit 111, containing these certificates, was slipped inside of the other envelope with the other stock. So that the entire stock issue of Fleming Brothers, Incorporated, up to and including the time of the death of brother Charles was on deposit in this envelope in this open lock drawer every day. All four of us had access to them. In using the word, "endorsement," I have referred to these assignments in blank
on the back of the certificates witnessed by Miss Ives.

119 I recognize the document handed me as the contract between the Massachusetts Mutual Life Insurance Company

on the one hand and Robert J., Charles, John A., and Stanhope Fleming on the other. I recognize the name, Charles Fleming, at the bottom of the contract as being the genuine signature of my deceased brother. I also recognize as genuine the other signatures including my own. That contract is still in operation and has been since the 21st of March, 1908. Exhibit 104 is a true copy of and has been substituted for the original contract.

120 Cross-examination.

By J. M. Parsons:

121-123 Fleming Brothers, Incorporated, own the real estate at the corner of Sixth and Walnut and a piece at Tenth and Grand avenues and a lot in North Des Moines worth \$300 or \$400. The corner of Sixth and Walnut on which the building stands is 66 feet by 132 and then on the west side of the quarter block we have 44 by 132 and between these two pieces we have a ninety-nine year lease on 22 by 132. That is the O'Callaghan property, so that it gives us a frontage on Walnut street of 110 feet and a depth of 132 feet.

I have never been married.

124 STANHOPE FLEMING, one of the defendants, testified as follows:

Examined by W. E. Miller:

Am fifty-two years of age. Am the youngest of the four Fleming brothers.

Robert left Michigan and went to Minneapolis in the spring of 1885, and I became twenty-one years of age June, '85. I recall the fact that when Robert and John went to Minnesota, Charles remained for a time at home in Michigan, where we lived. Charles was keeping house for a short time after they left, but later they came to my mother's home. John left in the spring of '86, and Charles left in the spring of 1887, two years after Robert had left. During that two years Charlie was working in the lumber yard off and on for the firm that succeeded us. Then we were making collections and I think we got up wood part of the time. I was there all the time Charles remained. I never knew of either Charles or myself working on the streets. I know that Charles did not work on the streets.

During that time in regard to the family finances, we were receiving remittances from Rob and we earned a little in the lumber yard and made some collections that we had to live on. All of this incoming revenue was turned into a joint fund, everybody using what they wanted. For a couple of years we were mixed up in litigations that required a good deal of time and also the making of these collections. I was producing some revenue myself and part

of the time I was sending money to the boys, Charlie, John, and Rob, and they were sending money to me.

125 & 126 It would depend upon who had it. When I would receive funds it went to everybody in the family that needed it or that wanted it, including my mother, my sister, and the plaintiff.

After the railroad contract was completed, I know of brother Charles having taken in some real estate up in Minnesota as the result of trades of the remnant of the railroading outfit and of payments made from Fleming Bros. at Dubuque. Whatever was provided in the way of revenue with which to procure and pay for these real estate holdings in Minnesota, was provided by Fleming Bros., and when these holdings were disposed of from time to time, the proceeds went into Fleming Bros.' fund. From time to time real estate has been acquired here in Iowa and conveyed to outside parties by Fleming Bros. It was always paid for out of the joint funds and when sold the proceeds went into the joint fund. No one of the brothers has ever to my knowledge acquired or held any individual or separate estate in any real estate anywhere.

127 Witness resumes: I recognize this as the stockbook of Fleming Brothers, Incorporated. Have examined the signatures on the back of each of the certificates contained therein running from 65 to 96 both inclusive. I am familiar with the signatures of my three brothers. I have seen my brother Charles sign his name many times. The name, Charles Fleming, as it appears on the back of stock certificates 66, 75, 76, 77, 78, 79, 80 and 94 is the genuine signature of Charles Fleming.

All of the signatures of all of the brothers on all of these certificates I recognize to be their genuine signatures, respectively.

When stock certificates numbered 65 to 92, both inclusive were issued, they were all assigned and put in the envelope in the safe in the office of Fleming Bros. I identify exhibit 110 as being the envelope prepared for that purpose by Miss Foss, our bookkeeper. I have seen these certificates which were issued to and assigned by Charles Fleming in that envelope hundreds of times, during the lifetime of my brother, and they were there in the same place

128 at the time of his death, in that same envelope. I also recognize exhibit 111 as the envelope that contained four certificates of 1250 shares each, which were issued in 1914. It contained certificates 93, 94, 95 and 96 of 1,250 shares each. No. 94 was the certificate issued to Charles Fleming. On the back of it I recognize as genuine his signature. That certificate along with the other three was kept in this envelope 111. It was put there immediately after the assignment of it was made, and I have seen it there from time to time during the lifetime of my brother and since his death.

The place in which these certificates were kept was a place to which myself and my brothers all had access.

I operated the insurance business in Omaha from 1895 down to about July of this year under the Mutual Life contract with Fleming Bros. and we used the term, "Fleming Bros., Managers," and operated under the Massachusetts Mutual contract as "Fleming

Bros., General Agents." All of the revenues of that business went into the joint fund and all of the expenses of the business were paid by checks made on the joint funds. My personal expenses were paid by checks made against Fleming Bros. joint fund. I never have at any time maintained an individual banking account. None of my brothers ever had an individual bank account so far as I know. I have never owned any property in my own individual right as distinguished from the joint property.

Q. Have you ever been in debt to any of your brothers?

A. Never.

Q. Have any of your brothers ever been in debt to you?

A. Never.

129-131 I have heard the testimony of Miss End, the bookkeeper, as to the various expense accounts of the Fleming brothers and of the family. That method as described by her was pursued with my knowledge and cooperation. I have never had anything to do with fixing the amount that was drawn from the funds of the firm or brotherhood by the non-producing members of the Fleming family. The amounts so drawn by them have been fixed by the individuals who wanted the funds.

I have never had any knowledge as to the relative amount of my earnings as compared with those of my brothers. I have never had and do not now have any idea as to the relative withdrawal of funds from the joint fund for my own use until we began in this case, I never paid any attention to it. There has never been any division or dividend as between us. There has never been any attempt at any time in any manner to ascertain the relative value of a supposed interest of any of us. All of the drawings have been charged off in Profit and Loss and no attempt made at any equal division.

I am familiar with the contract of Fleming Bros. with the Massachusetts Mutual which has been identified here in evidence. I am a party to that contract which is still in operation and was at the time of the death of my brother.

132 Cross-examination.

By J. M. Parsons:

I am a widower. Was married in 1892 and my wife died in 1894. I have no children.

All of the certificates of stock of Fleming Brothers, Incorporated which have been issued prior to the death of Charles have since been surrendered and canceled and new certificates of stock issued. The present outstanding stock is a reissue of this old stock in new certificates.

Q. There was not any particular attention paid into which shares of the present issue the old issues were merged, except to see that they were all taken up and new certificates issued to cover the whole of the capitalization, is that true?

A. Well, they were re-issued and made payable to the survivors or survivor, without the assignment on the *bank*.

These assignments on the back of the certificates had been signed in blank and were in blank at the time of Charles' death. None of them had been filled out. The re-issue took place April 12, 1916.

Q. Now I notice that on the back or on the face of a number of the certificates, being Nos. 65, 66, 67, 68, 74, 79, 80, 85, 86 and 92 is written the following: "April 12, 1916. Certificate Nos. (repeating the numbers that I have just read) cancelled and re-issued and included in Nos. 108, 110, 111, 112, 113, 114, 115, 116, 117 and 118. John A. Fleming Secretary." Now that entry you understand was made there to show what had become of that stock?

A. I presume so.

Q. And the other certificates I notice on them, would be simply a recitation, for instance No. 69 re-issued into 101, and so on down the line?

A. I presume so.

136 Testimony closed.

The submission of said cause was completed at 10.55 a. m., Friday, December 22, 1916, and the Hon. Charles A. Dudley took the case under advisement, saying among other things:

The Court: I am in harmony with both sides of this case to this extent, that these contracts must determine the rights of these parties in view of the provisions of our statute. So, as far as this case is concerned, it is now in the hands of the court, and there will be no further public proceedings in regard to it until I announce my opinion.

Thereafter, on the 14th day of April, A. D. 1917, the said judge, the Honorable Charles A. Dudley, filed in said cause a written opinion.

Thereafter, on the 23d day of October, A. D. 1917, there was made and entered of record in said court and cause the following

DECREE

Now on this 23d day of October, A. D. 1917, being a regular judicial day of the September Term of this court, this cause
137 coming on for final hearing and decree, plaintiff appearing by Parsons & Mills, her attorneys, and the defendants by Parker, Parrish & Miller and Albert B. Cummins, their attorneys, and all of the evidence and arguments having been heard by and submitted to the Hon. Charles A. Dudley, one of the presiding judges of this court, who filed his written opinion and decision herein on the 14th day of April, A. D. 1917, and he having since deceased, and the parties hereto by their counsel in open court agreeing that this decree

is in harmony with the said opinion filed as aforesaid; the District Court of Polk County, Iowa, the Hon. Lawrence De Graff, one of the judges thereof presiding, therefore finds and decrees as follows, to wit:

First. That the above mentioned Charles Fleming died in the city of Des Moines, Polk County, Iowa, on the 15th day of January, 1916, intestate, without issue, leaving his widow, the plaintiff herein, and his brothers, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, as his only heirs at law.

Second. That at the time of his death the said Charles Fleming was a member of a co-partnership known as Fleming Bros., of which the remaining members were the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, and that each member of said co-partnership has an equal, undivided interest in the property thereof, subject to the payment of the outstanding indebtedness.

Third. That all property both real and personal, held in the name of the co-partnership or in the names of the individual members thereof, was in fact partnership property, except household effects, and except the undivided one-half interest in the southeast quarter (SE $\frac{1}{4}$) of the northeast quarter (NE $\frac{1}{4}$) and southwest quarter (SW $\frac{1}{4}$) of the northeast quarter (NE $\frac{1}{4}$) of section eight (8), township one hundred eleven (111), range forty-one (41), Lyon county, Minnesota, which was held in the name of Charles Fleming, for the co-partnership, in trust for Ada Fleming, a relative and a minor. The interest of the co-partnership in the property last described is limited to reimbursement for the sum advanced to secure the title. It is further found that the property of the co-partnership includes the insurance on the lives of the several members thereof, except the policy or policies payable to the wife of Robert J. Fleming, and does not include any property held in the name of Fleming Brothers, Incorporated, the interest of the co-partnership in that respect being represented in the ownership of the capital stock of said corporation, nor does it include any claim for a readjustment or accounting for sums drawn by either member from the funds of the co-partnership for personal or living expenses.

Fourth. That the conveyances executed by the plaintiff after the death of her husband, Charles Fleming, did not in any manner change the beneficial interest in the property conveyed and it still remains partnership property to be accounted for accordingly.

Fifth. That the estate of Charles Fleming, deceased, consists of one-fourth of the residue of the aforesaid co-partnership property after the payment of all of the indebtedness of the co-partnership existing at the time of the death of said Charles Fleming, and after deducting one-fourth of the reasonable expenses of disposing of sufficient of the property to pay the said indebtedness.

Sixth. That Robert J. Fleming, John A. Fleming, and Stanhope Fleming as surviving members of said co-partnership have the right, and it is their duty in the law to wind up the affairs thereof.

Seventh. That the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, continuing to operate as "Fleming Bros.," since the death of Charles Fleming have been and are delivering to plaintiff, weekly checks of forty-five dollars (\$45) being exactly the same amount as she had received during the last eight or ten years before the death of her husband, Charles Fleming.

It is therefore ordered, adjudged and decreed, that the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, proceed with reasonable dispatch to sell and dispose of sufficient of the aforesaid co-partnership property to pay all of the indebtedness thereof and to pay the same, together with the expense incident thereto, including fair compensation for their services, and thereupon transfer and deliver to the administrator of the estate of Charles Fleming deceased, one-fourth of the residue of said property to be distributed by him according to law.

It is further ordered, adjudged and decreed, that the costs of this proceeding, amounting to — dollars (\$—), be taxed to the defendants, Robert J. Fleming, John A. Fleming, and Stanhope Fleming, and judgment is hereby rendered against them and each of them therefor.

140 To all of which the defendants except.

Lawrence De Graff, Judge. O. K. as to form. Parker, Parrish & Miller, Albert B. Cummins, Attorneys for Defendants. Parsons & Mills, Attorneys for Plaintiff.

APPEAL

Thereafter, on the 31st day of October, A. D. 1917, the defendants in said cause namely, Robert A. Fleming, John A. Fleming, Stanhope Fleming, Fleming Bros., and John A. Fleming, administrator of the estate of Charles Fleming, deceased, appealed from the decree and judgment of the District Court of Polk County, as aforesaid to the Supreme Court of Iowa by serving upon the plaintiff and her attorneys of record, and upon A. E. Mahan, the clerk of the said district court, their

NOTICE OF APPEAL

and by securing to the clerk his costs of a transcript in manner and form as required by law, and the said notice of appeal and proof of service thereon was on the 31st day of October, 1917, duly filed in the office of the clerk of the District Court of Polk county, Iowa.

141 APPELLEE'S AMENDMENT TO ABSTRACT

[Filed April 1, 1918]

(Portions Stipulated to be Deemed Material)

142 There was on the 14th day of April, 1917, filed by the Hon. Charles A. Dudley, a written opinion in this cause as follows:

OPINION

Charles Fleming died January 15, 1916, without issue, leaving surviving the plaintiff, his widow and three brothers, Robert, John A. and Stanhope.

At the commencement of this case it was supposed said decedent died intestate, but during the trial a will was discovered, produced and is now pending for admission to probate. At present the will is immaterial and may or may not become of importance to the parties in interest.

Plaintiff and deceased were married January 2, 1881, and lived together continuously as husband and wife until his decease.

In her bill the plaintiff alleges that her husband and his surviving brothers, defendants, had all of their business lives been associated together in business as a partnership, had accumulated much property, personal and real, in equal proportions and that her husband died seized of an undivided one-fourth of all the partnership property, subject only to a proportionate liability for the partnership debts.

That her husband carried life insurance in the amount of \$58,000 which the defendants have collected and converted to their own use.

That the Fleming Brothers owned a corporation known as the "Fleming Brothers, Incorporated," in which the stock of 143-145 \$100,000 was equally divided, one-fourth of which stood in the name of the deceased, Charles Fleming.

That certain real estate stood in the name of her husband Charles Fleming at the time of his decease, but is now claimed by the three surviving brothers.

In the charging part of her bill the plaintiff alleges that the surviving brothers of her husband and John A. Fleming, as administrator of the estate of Charles Fleming, deceased, claim, (saving and excepting the household goods estimated in value at about \$500) that all the balance of the property of said decedent belongs to the surviving brothers under and by virtue of the terms of three certain contracts in writing in words and figures and order of execution as follows:

(The Trial Judge, Hon. Charles A. Dudley, here sets out in hæc verbæ the three contracts between Robert J., John A., Charles and Stanhope Fleming, identically as they appear in plaintiff's petition and in the opinion of the Supreme Court of Iowa as herein quoted from Vol. 174 Northwestern Reporter p. 946 et seq.)

146 But as to these contracts, the plaintiff alleges that in so far as they affect her rights as the surviving widow of her deceased husband, they are null and void for two reasons:

1. They are without consideration and are contrary to public policy.
2. They operate as a fraud upon the plaintiff and her rights as the widow of the deceased.

The plaintiff further alleges that the above contracts are testamentary in character and purport to accomplish in themselves what cannot be accomplished by will under the statutes of Iowa.

Plaintiff claims that she is entitled to the distributive share of the property of her deceased husband as provided by the statute of Iowa, to wit: a reasonable amount for her support for the period of one year from the death of her husband, seventy-five hundred dollars and one-half of the remainder of her deceased husband's estate. The above is plaintiff's claim upon the theory that her husband died intestate.

The defendants claim that they own jointly as surviving joint tenants all of the property in which their deceased brother Charles Fleming had an interest during his lifetime, his household effects alone excepted.

They deny that they were associated as a partnership that they owned all of their property in equal proportions, and that their brother Charles died seized of an undivided one-fourth interest in any property or in any partnership property or in any property owned by Fleming Bros.

As to the life insurance upon the life of said Charles Fleming, defendants allege that a joint tenancy composed of themselves and

147 Charles Fleming during his lifetime, at the joint expense of said joint tenants, carried a considerable amount of life insurance upon the life of each of the said four joint tenants and that each and every policy of insurance upon the life of each and every of the said four joint tenants was payable to the other members of said joint tenancy, save and except policy 741,051 issued upon the life of Robert J. Fleming, payable to his wife Emma D. Fleming, and that as such joint tenants they carried and collected life insurance to the gross amount of \$55,482.16 upon the life of Charles Fleming under policies each and every of which were payable to Robert J. Fleming, John A. Fleming and Stanhope Fleming or to the survivor of them, of which life insurance \$18,474.87 was deducted therefrom and applied by the insurance company issuing said policies in payment of loans which had theretofore been obtained and which were outstanding upon said policies, and that the balance of \$37,007.39 was by the beneficiaries paid to the Mutual Life Insurance Co. of New York on loans made by said company on policies upon the lives of these defendants.

The creation of the corporation "Fleming Brothers, Incorporated" having a capital stock of \$100,000 is admitted, but they aver that the stock was not divided, except nominally, and that pursuant to the contracts above set out, certificates aggregating twenty-five hundred shares were issued by said corporation in the name of each of the four brothers, but to them as joint owners and tenants.

That upon the issue of said stock, each brother as a joint tenant, forthwith endorsed the certificates and deposited same in a common receptacle to which each brother had access all the time, and said stock is owned jointly by Fleming Bros. as joint tenants and by the survivors or survivor of them.

148 As to the real estate standing in the name of deceased at the time of his death, it is averred that it was at all times the property of Fleming Bros. with the incident of survivorship as between them; that the same was acquired with joint funds and held for the joint benefit of said joint tenants and the survivors or survivor of them.

They further aver:

"That on or about the 11th day of April, 1916, the plaintiff Anna B. Fleming with full knowledge of all the facts and of the title and interest claimed by these defendants, ratified and confirmed the contracts referred to and set out in her petition by executing and delivering to these defendants quit-claim deeds conveying to them as joint tenants and to the survivors and survivor of them any and all interest which she apparently had in real estate as the surviving widow of Charles Fleming, deceased."

That by reason of the fact that Charles Fleming had only the interest of a joint tenant, Charles Fleming did not die seized of any real estate, and consequently the plaintiff was not entitled to any dower or distributive interest therein as the widow of Charles Fleming, deceased.

The defendants admit the execution of the contracts, and aver that they are valid and binding in all respects upon the plaintiff and inure to their benefit as the surviving joint tenants of the deceased, and deny that their brother Charles Fleming died seized or possessed of any estate in any property whatsoever except household effects, and deny that their said brother either during his lifetime or at his death either owned or was possessed of or entitled to any estate of inheritance or any estate in which the plaintiff was, is, or could be entitled to a dower or distributive share or interest of any sort.

149 The plaintiff replies denying ratification and confirmation and averring that her signature to certain instruments made by her shortly after the decease of her husband was obtained by duress, and she prays to have them cancelled.

The foregoing statement presents substantially the facts and claims of the parties, and therefrom the question to be determined is readily seen to be: What is the property interest or estate, if any, Charles Fleming had in the property of the so-called partnership "Fleming Brothers" at the time of his decease?

The essential and controlling facts to be considered at this time are not in dispute. It appears that since the date of the first agreement, December 14, 1896, continuously to the decease of Charles Fleming, he and his three brothers have been "mutually associated" "jointly engaged" and "associated together" in the prosecution of a Life Insurance business which has furnished "profits, earnings and income," to the production of which each has contributed his personal service, under written agreements subsisting between the four brothers, who were engaged in carrying on a business in common with a view of profit.

Each brother or member of the partnership, Fleming Brothers from time to time appropriated or drew from the joint fund for his own use such sum as he saw fit, but no accounting has ever been required therefor by the remaining partners, by virtue of a stipulation in the first and second agreements to the effect "that at no time shall any accounting be made or required to be made by any party hereto (the agreement), his representatives, executor, heirs, 150 or survivors" and in the last agreement that what "a decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein." In other words, whatever the appropriation of the joint fund by one brother he did not become a debtor either to the firm or to any member of it on account of such appropriation.

If the court were required to construe the agreement as to the amount of the joint property which each brother could in fact appropriate to his separate uses, or as to the amount which a creditor of one of the brothers could seize without the consent of the other brothers, it considering the business and the contribution of capital by each party to the contract, would have to give it both an equitable and reasonable construction, for it cannot well be insisted that one to the exclusion of the others could appropriate to his own use or suffer to be appropriated or seized at the instance of a creditor of one of the brothers more than one-fourth of the joint fund or estate.

At the death of Charles Fleming a large joint property had accumulated, held and owned by the brothers in excess of appropriations by the several members of the firm, but so limited had been the appropriation by the deceased of the joint property that he had no estate as appears by the inventory of his administrator save and except his household effects, about \$500 in value, set apart to his widow, plaintiff in this case, if the contention of the defendants is correct as to the effect of his three agreements.

Who owned this property accumulated by the four brothers at the death of Charles Fleming?

We have to consider a contractual relation disclosed by three separate agreements, serials in point of time, the declared 151 purpose of which is, "to fix and determine the interests of each therein" in the business in which the parties were jointly engaged, the extent of which interest as stated in the last agreement is "what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein," and in the prior agreement, "only such share of and interest in the profits, earnings and income of the business of Life Insurance in which we are or shall be jointly engaged as shall be actually received by each or paid upon the order of each with the consent of the others from the income of said business."

In further assurance to each other and to third persons of the limitation upon interest in the profits, earnings and income of the business, they stipulate that upon the death or withdrawal of any party to the agreements "his interest in the business shall cease" and that no accounting shall be required by any person whomsoever,

and that "any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business."

The only capital contributed to the business of Life Insurance is "labor performed" and that has been of such character and amount as to result in a large accumulation of property owned by the partnership composed of the four brothers at the decease of the brother, Charles Fleming.

About six weeks after the date of the first agreement, a second agreement was made between the brothers, intended solely to remove some doubts which had arisen as to whether the first covered interests in the renewals of policies of insurance due or to become
152 due since January, 1893, and because of that doubt they were included in the second agreement. In legal effect the second agreement is the same as the first, but the following is quoted therefrom, to wit:

"In view of our past association in, and the manner of the conduct of our business without the usual and ordinary incidents of a partnership, and to more effectually define and determine our individual interests in said business in the future as between ourselves and in relation to all other persons and to provide for the future uninterrupted prosecution of said business," etc.

The business of life insurance continued and was prosecuted uninterruptedly by the brothers, when later, January 17, 1911, a third agreement was made by and between them, wherein the second clause restates the limitation of the property interests of a deceasing brother in the property then owned and thereafter in the further prosecution of their business, acquired by the partnership.

At the date of the last agreement a part of the property owned by the brothers was the stock in the corporation "Fleming Bros., Incorporated" of which "each of the undersigned (the undersigned being the four Fleming Brothers) is the owner of one-fourth," as stated in the contract. The brothers at this time carried insurance, accident and life, upon their respective lives, the policy on the life of each brother payable to his three brothers, "the premiums of which have been paid by the partnership and the partnership is entitled to the proceeds of all such insurance except a policy payable
153 to Emma D. Fleming," as further stated in the agreement.

This third contract was prepared and made with reference to the conditions of the parties thereto and their property as of its date and as to property to be "hereafter acquired."

Considering the terms of the agreements, it is clear they were made with an intent to establish a joint ownership of the property acquired by the brothers, with the right of survivorship, upon the death of a brother, in the surviving brothers or brother. Such intent and purpose appear in each contract, but whatever the intent and purpose of the first two agreements, the last agreement is determinative of the rights of the parties involved, inasmuch as that agreement is the one in force at the death of Charles Fleming and states the present working and holding agreement of the partnership; therefore upon the

construction of that agreement must the rights and interests of the parties be determined.

The thought of an existing partnership in law is expressed in the first clause of the agreement, to wit:

"That the partnership between the undersigned is with the express and distinct understanding and agreement that all the property heretofore acquired by the undersigned has been acquired as the results of the said partnership and that said property belongs to the said partnership, including all proceeds of said insurance business with the renewals to which the parties hereto may be entitled thereon."

In the second clause of the contract it is stated, that, "upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners," and again it is said, "surviving
154 brothers of the said partnership", and "withdrawn from said partnership" and further and finally in speaking of the premiums on insurance on the life of each brother it is said, "have been paid by the said partnership and the said partnership is entitled to the proceeds of all such insurance except the policy" upon the life of one of the brothers payable to his wife "which is not a part of said partnership property."

The phraseology of the last agreement indicates that in the mind of its author, notwithstanding the terms of the former agreements the business of the Fleming Bros. as conducted, come under the first two agreements, had been in fact and was in law that of a partnership.

In the absence of an agreement as to the interest of each brother, partner in the partnership, in the property of the partnership the law presumes it to be equal and upon that presumption, if not as the result of agreement, in one of the whereases of the last agreement it is stated that each brother is the owner of one-fourth of the stock of the corporation known as "Fleming Bros., Incorporated."

The frequent use of the word "partnership" in the last agreement does not determine that in fact one existed between the brothers, but it does suggest that the author of that contract concluded that the legal intention of the parties would control, and consequently in legal contemplation there existed in fact a partnership. On this point Cooley, J. in *Beecher v. Bush*, 45 Mich., 188 said, "It is nevertheless, possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else or that they even expressly declare that they are not to be partners.
155 The law must declare what is the legal import of their agreements and names go for nothing when the substance of the arrangement shows them to be inapplicable."

The agreements under consideration show conclusively that the four brothers who signed them contributed their respective services and skill equally to the joint business provided for and carried on under the three agreements, for their common benefit and that they

owned and shared the profits thereof to the extent of the demand of each brother. The circumstance that upon the death of one of the brothers, the decedent's share in the profits is limited "to what he has theretofore drawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein" establishes beyond controversy that such brother owned and shared in the profits of the business. The undisputed evidence shows that each brother appropriated to his own use without restriction whatever he desired of the joint fund or property without in any manner becoming debtor therefor to any one whomsoever.

Such unlimited right can only be recognized and justified upon the conclusion that each brother had no interest in the common or joint fund which he could have and enjoy at his pleasure as the owner thereof.

With a right to appropriate so unrestricted, an individual creditor of one of the brothers could secure payment of his unpaid demand from the joint fund not by reason of the liability of the other brothers therefor but by virtue of the interest or estate our brother had in the partnership property, subject of course to the priority of partnership creditors.

Instead, therefore, of conducting "a business without the usual and ordinary incidents of a partnership" they have mutually created and mutually conducted a business between themselves and by themselves for profit as principals therein for their own profit with every usual and ordinary incident of a partnership. This conclusion is sustained by the terms of the last agreement.

The three agreements are silent as to sharing losses if they, instead of profits, should attend the conduct of the business by the brothers under the agreements.

In Iowa, speaking of the essential characteristics of a partnership between the associates in the common enterprise, the Supreme Court has said, in order to constitute a partnership *inter se* there must be a sharing in the losses as well as in the profits.

This state is therefore committed to the rule that in partnership there must be a community of loss as well as a community of interest. It is not, however, necessary that the agreement of the parties should contain an express provision that each partner or associate should share losses. An obligation to share losses may be inferred from the agreements and from the relation of the parties to the business to be transacted.

In the instant case the original contribution of capital was the equal service of each partner to the business to be done by the partnership, and to which business there has been given by each equal and undivided service and attention. There has been equal authority in the management, control and conduct of the business, and equal interest in, right to and ownership of the property of the partnership, and an equal right and power in disposition of it, even though individual appropriation of the firm property has been unequal, but because of that fact neither brother has become a debtor to the firm or any member of it.

The last agreement states "that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein" but such covenant in no sense restricts the rights and powers of each co-partner as a member of the co-partnership while living. The inference is therefore a reasonable one that each partner was to share losses, if any, equally.

It is claimed that the property held and owned by the parties is a unit owned by four parties, or that there is a legal entity owning this property separate and apart from the persons composing it, but from a legal standpoint this is true only in a limited sense. For most purposes the law regards only the individuals who occupy the partnership relation, though in this state for the special purposes of taxation and process against a partnership, a partnership is regarded as a distinct entity. In recent cases, however, where the partnership is spoken of as having its own property, its own creditors, it means that the partners as such have special rights and liabilities which are worked out through their partnership relation. The brothers are the owners of the property acquired, subject only to the right of creditors, in a relationship of mutual agency in a business conducted by them for their mutual benefit and profit.

In conclusion I find that this was a partnership between the brothers, and the property owned by the partnership at the death of Charles Fleming was acquired by partnership funds and is to be treated with the usual incidents of partnership property in which each partner is entitled to an undivided one-fourth, unless, as claimed, the property of the partnership upon the death of one of the partners became that of the surviving brothers, and if it did the estate of the deceased had no interest therein.

II.

And this comes to the second question in the case. By virtue of the last agreement between the brothers was the property or interest of Charles Fleming in the partnership of Fleming Bros. disposed of so that upon his death his estate had no interest therein or any right thereto?

The last agreement in its preamble states five "Whereases" each implying recognition of facts, as follows:

"Whereas, the undersigned, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming are engaged in the life insurance business in the States of Iowa, Nebraska and Wyoming under a contract with the Massachusetts Mutual Life Insurance Company; and

"Whereas, each of the undersigned is the owner of one-fourth of the stock of a corporation organized under the laws of the state of Iowa known as Fleming Brothers, Incorporated; and

"Whereas, the undersigned also are the owners of certain real estate and other property in which each of them is interested; and

Whereas, the undersigned expect to acquire additional property hereafter; and

"Whereas, the said property now held and owned by the undersigned has been acquired by them with the understanding that it shall be disposed of as hereinafter set out."

159 The last but one of the above refers to property to be acquired in the future and the last to property then "held and owned" and further states an imperative obligation as to this property to be performed in the future, to wit: "shall be disposed of as hereinafter set out." The time and occasion for the disposition of property "hereinafter set out" is found in Article 2 as follows:

"That upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces said stock in Fleming Brothers, Incorporated, shall be and become the property of the surviving brothers of the said partnership, and that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein."

All the property held and owned by the Fleming Bros. was acquired by the four brothers engaged in carrying on a business in common with a view to joint profit and was therefore partnership property in which each brother had the interest of a partner, and for want of an agreement to the contrary had an equal and undivided one-fourth. The extent of that individual interest is determined by the residue of the property after firm debts are paid. Each partner continued in the association with equal voice and control in the management of the business and equal right to appropriate the joint fund for his personal use up to the date of his death. He held and enjoyed his interest in the joint property without limitation or restriction as long as he lived. These rights and interests terminated only "upon the death of either one of the undersigned."

160 Whatever title and interest Charles Fleming had in the property held and owned by the four brothers did not pass from him till death. As a means of divesting title the last agreement is not effective until the death of Charles Fleming.

The agreement did not by its terms operate as a conveyance in presenti but as a conveyance only upon the death of one of the brothers. The instrument itself and the acts of the parties under the instrument do not reveal an intent to convey an estate or interest that should vest immediately, but on the contrary, one that should pass only upon death.

The statute (Sec. 3362) refers to the property of deceased not necessary for the payment of debts, "nor otherwise disposed of" and if the agreement in question did not dispose of the property of Charles Fleming before his decease he died holding and owning it, and if he died intestate his interest therein is to be distributed to the same persons and in the same proportions as though it were real estate, but if he died testate, as directed by his last will and testament.

If the conclusion is correct that the association styled Fleming Bros. is a partnership with the usual and ordinary incidents of a partnership, then upon the death of Charles Fleming the partnership was dissolved, the legal title to all the partnership property passing to the surviving partners in trust, however, to apply the assets to the payment of debts, close upon the business with reasonable promptness and to account to the legal representatives of the deceased partner for his share of the final balance.

161 I conclude and hold that under the agreements, of which the last is the one under which the property is held that the decedent had an interest in the property of Fleming Bros. not disposed of prior to his decease, but disposed of his death under the agreement, which disposition is testamentary in character but void for that purpose.

But for another reason the contention of the defendants cannot be sustained.

Our statute (Sec. 2923) provides that conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed, but when it was before our Supreme Court (*Hoffman v. Stigers*, 28 Iowa, 302) for construction where a conveyance had been made to a husband and wife and it was contended that as at common law the husband and wife were one person in law they took as tenants by entirety, therefore upon the death of the husband the wife had the right of survivorship and took in entirety, the court, Wright, J., said:

"With us, therefore, when the estate is held by two or more, not as trustees, but in their own right, nothing being expressed to the contrary, the tenancy would be in common. And thus most plainly and authoritatively is the estate of joint tenancy disfavored by our law. There is no reason, no necessity, for such an estate, except under the most peculiar circumstances. In the language of the old Massachusetts statute (1785, ch. 62) tenancies in common are "more beneficial to the commonwealth and consonant with the genius of republics. "And as now we in most of the states condemn entailments, or perpetuities, so we do and should joint tenancies, or at least their common-law incident—the right of survivorship."

162 The intent to create a joint tenancy was not expressed and the incident of a joint tenancy, the right of survivorship, was denied.

Notwithstanding the early condemnation of joint tenancy in this state, that such an estate may exist here must be conceded, but the concession does not go to the extent of sustaining such estates when the creation of them is forbidden by or is inconsistent with the laws of this state.

The *intent* of the parties to the instruments set out above is clearly to create an estate with the incident of survivorship which in effect deprives the widow of her marital rights.

An examination of the agreements discloses an intent to bar the widow of any deceasing brother, and children as well, if any, of any interest whatever in the estate accumulated by the decedent during

marriage and held and enjoyed by him without restriction until death. Such dispositions of property are condemned in this state because they are "not consonant with the genius of republics." They are fraud upon the marital rights of the surviving spouse. The fact that a wife is without an inchoate right in the personal estate of her husband and that it may be submitted to the perils and vicissitudes of business and be wholly lost thereby and she is powerless to prevent such a disposition of property does not sanction a disposition of property as a bar, for if not inconsistent with any law of this state, it runs counter to her public policy which forbids the creation of like or similar entities as the owner of property with the incident of survivorship thereby affording a ready and convenient instrumentality to dispose of personal property and leave surviving spouses and children dependents who otherwise might be, and if might be could be, independents.

It is conceded in argument.

"that a contract which is made for the purpose of defeating the dower rights or distributive share of a wife who becomes a widow is void, not because of any particular sacredness in the subject as defined in the statutes providing for such a distributive share, but because the purpose sought to be affected is or may be a fraudulent one. If the paramount purpose of the contract is to defeat dower or distributive share, this would be evidence of fraud. But in the case at bar, the purposes of the contracts was to establish the working basis upon which these brothers should conduct their business. Under these agreements they worked and prospered for twenty years. Charles Fleming and his wife might today, under the hand of Providence, be the absolute owners of all of the product of the labors for the four brothers. The effect of the contracts upon the status of the plaintiff is purely incidental. It was not the provision or purpose of the contracts to create that status to the detriment of the plaintiff, nor to the detriment of the wife and descendants of any one of the four brothers."

This argument ignores the paramount purpose of the agreements, which is, as is seen by a reading of them, not only to provide a working basis upon which the brothers should conduct their business, but to provide for the transmission of the interest of each brother in the business and contrary to the holding of property in common, attach thereto the interest of survivorship, thereby with intent limit the interest of each brother to what he had withdrawn during his lifetime, and consequently deprive a surviving spouse of any share in the accumulated property; otherwise why create a joint tenancy with the incident of survivorship? The status of the plaintiff as the widow of Charles Fleming if "purely incidental" is the incident of a prearranged plan which deprives her of her share in the estate of a deceased husband and as it is to her detriment is in law a fraud upon her marital rights.

It is to be said, however, that the defendants observing the right of the plaintiff to be treated as one of the family have weekly, notwithstanding the contention of plaintiff, mailed to her a check in

exactly the same amount as she had received during the last eight or ten years before the death of her husband.

A parallel case is not by the diligence of counsel found, and I do not deem it necessary to review in this opinion the many citations appearing in the full and very able briefs of counsel for the respective parties.

I have said that the essential and controlling facts are not in dispute. One branch of the case has called forth very conflicting testimony, that pertaining to the execution of some instruments a few days after the death of Charles Fleming. The rights of the parties are not, in my opinion, affected by those contracts and conveyances for the simple and persuasive reason that it was not the intention to divest thereby the plaintiff of any interest in the estate of her husband if she had any.

As the pleadings and proofs now stand the plaintiff is entitled to a decree as prayed, and it is so ordered, with exception to the defendants.

Chas. A. Dudley, Judge.

165

APPELLANT'S BRIEF AND ARGUMENT

[Filed September 4th, 1918]

(Portions Stipulated to be Deemed Material.)

Propositions and Authorities Relied on for Reversal

Proposition I

The controlling factor in this case is the validity of the Fleming family compact which has existed for over forty years and which is formally expressed in the written contracts, exhibits 101, 102, and 103.

(a) The court should give effect to contracts rather than to nullify and declare them void.

(b) Courts should find out and give effect to the true intention of the parties in construing their contracts.

(c) Unless such true intention is violative of positive law or sound morals, the contracts should be upheld.

(d) The validity of the contracts and the true intention of the parties to them should be viewed and determined in the light of the practical construction placed upon them by the parties and of their acts and practices under and pursuant to them.

(e) As the three contracts are in *pari materia* they should be construed together and effect given to the provisions of each and all of them, since they are not in conflict with each other.

See authorities hereinafter cited.

Proposition II

While the Fleming brothers, Robert, Charles, John A., and Stanhope, were doubtless as to outside dealing with them, a part-

166 nership, nevertheless, the contracts in controversy recognize as existing and expressly provide for a joint tenancy with survivorship and exemption from accounting; and these express provisions are expressly made binding upon the heirs, survivors, executors, and administrators of each of the four brothers.

(a) Joint tenancies with the incident of survivorship when expressly contracted for, are recognized and upheld by the law of the state of Iowa and the contracts in controversy are valid in that respect.

Code, section 2923;

Wood v. Logue, 167 Iowa, 436; 149 N. W. 613;

Baker v. Syfritt, 147 Iowa, 49, 62;

23 Cyc., p. 483 § b;

23 Cyc., 484, et seq. under the following headings:

2. Distinction between joint tenants and tenants in common.—p. 484;

3. Who may be joint tenants.—p. 484;

5. Essentials to joint tenancy.—p. 484;

9. Survivorship.—p. 488;

E. Devises.—p. 495.

(b) The estate of one of several joint tenants in the joint property is not an estate inheritance.

23 Cyc., 495 § E—Devises;

Wood v. Logue, 167 Iowa, 436; 149 N. W. 613;

See authorities above cited.

Proposition III

Dower cannot attach to the estate of a joint tenant where, as in this case, his estate remains joint until his death, because his estate is not an estate of inheritance. Since Charles Fleming was survived by his joint tenants, Robert, John A., and Stanhope, he 167 neither possessed in his lifetime nor died seized of any estate to which a dower interest in plaintiff could attach or in which a dower interest could inhere. He merely departed from the estate at his death.

Code, section 3366;

14 Cyc., p. 891 Dower. 1 and 2.

14 Cyc., pp. 895, 896 "9. Joint seizin."

14 Cyc., pp. 901, 902. "Estates and interests—1. Estates of inheritance." "Estates in common or joint tenancies."

See authorities in support of Proposition II.

Proposition IV

There is no "public policy" of the state of Iowa either additional or superior to our statutory provisions prescribing the creation, existence, or preservation of dower interest of a surviving widow. Dower in this state is statutory only. Our statutory enactments contain the whole law on the subject. Our "public policy" is expressed in these statutes: outside of the statutes it has no existence.

Code Sections 3366, 3362;

- U. S. v. Freight Ass'n, 166 U. S. 290, 340;
 Logan & Bryan v. Postal Tel. Co., 157 Fed., 570, 587;
 C. R. & St. P. Ry. Co. v. Spafford, 41 Iowa, 292;
 People v. Hawkins, 51 N. E. 257, 260; 42 L. R. A. 490; 68
 Am. St. Rep. 736;
 Hartford Fire Ins. Co. v. Ry Co., 70 Fed. 201; 175 U. S. 91;
 Swann v. Swann, 21 Fed. 299, 301;
 Vidal v. Girard's Ex'rs, 43 U. S. 127 (2 How.);
 Spread v. Tomlinson, 73 N. H. 46; 59 Atl. 376, 397; 68 L.
 R. A. 432;
 Couch v. Hutchinson, 2 Ala. App. 444; 57 So. 75, 76;
 People, ex rel. v. Shedd, 89 N. E. 332, 334; 241 Ill. 155;
 168 Harding v. American Glucose Co., 55 N. E. 577, 599; 182
 Ill. 551, 616; 64 L. R. A. 738; 74 Am. St. Rep. 189;
 Perry v. Furniture Co., 83 N. E. 444, 447; 232 Ill. 101;
 Borgnis v. Falk Co., 133 N. W. 209, 216; 147 Wis. 327; 37
 L. R. A. (N. S.) 489;
 Bigelow v. Old Dominion Copper Co., 71 Atl. 153, 174; 74
 N. J. E. 457;
 Edgerton v. Brownlow, 4 H. L. Cas. 122, 123;
 Kuhn v. Kuhn, 125 Iowa, 449, 453;
 McAlister v. Fair, 84 Pac. 112, 114; 72 Ks. 533; 3 L. R. A.
 (N. S.) 726; 115 Am. St. Rep. 233;
 State v. Coyle, 122 Pac. 243, 254; 7 Okla. Cr. 50.

The following cases decided by this court hold that common law
 dower does not exist at all in the state of Iowa; that the whole sub-
 -ject is statutory.

- Purcell v. Lang, 97 Iowa, 610;
 Ditson v. Ditson, 85 Iowa, 276;
 Kendall v. Kendall, 42 Iowa, 464;
 Mock v. Watson, 41 Iowa, 241.

History of dower legislation in Iowa.

- 1 Scribner on Dower, p. 54, et seq.

Proposition V

A. The contracts entered into by the four Fleming brothers,
 Robert J., John A., Charles, and Stanhope, recognized as existing,
 and of their own force were sufficient to create and vest in each in-
 -stantly a joint tenancy with survivorship and exemption from ac-
 -counting as to all property of every nature whenever acquired by
 the four brothers or any of them.

169 B. Since the said contracts recognized as existing and also
 expressly provided for a present vested joint estate, they are
 not testamentary in character and are valid and binding
 upon all whom they affect, the plaintiff included.

- McKinnon v. McKinnon, 57 Fed. 409. Opinion by Thayer,
 J., concurred in by Caldwell and Sanborn, JJ.
 Wood v. Logue, 167 Iowa, 436;

Vosberg v. Mallory, 155 Iowa, 165;
 Haulman v. Haulman., 164 Iowa, 471;
 Larimer v. Beardsley, 130 Iowa, 706;
 Smith v. Douglas County, 254 Fed. Rep. 244.

Proposition VI

Upon reasons (stronger if possible than the foregoing which apply particularly to real estate), it appears that Charles Fleming left no personal estate in which the plaintiff was entitled to share as his surviving widow.

Code, section 3362;

Vosberg v. Mallory, 155 Iowa, 165;

Lunning v. Lunning (Iowa), 168 N. W. 140;

Metler v. Metler's Admrs., 19 N. J. E. 457;

Haulman v. Haulman, 164 Iowa, 471.

(a) The property of Fleming brothers in the agency contract with the Massachusetts Life Insurance Company was essentially a joint tenancy and by its own terms, as well as by the terms of the contracts in controversy, inured to the benefits of the survivors and not to the estate of Charles Fleming.

(b) The stock in Fleming Brothers, Incorporated, was of course personal property and the plaintiff had no inchoate dower interest therein.

(c) When the certificates of stock in Fleming Brothers, Incorporated, were issued to Charles Fleming, they became at once without any formalities of transfer a part of the joint estate of Fleming Bros., because of and in pursuance to the provisions of the contracts.

(d) The act of Charles Fleming, assigning said certificates in blank and depositing them so endorsed in the common depository along with the stock issued to and similarly endorsed by the other brothers and to which depository all of the brothers had access, constituted a performance of and compliance with the contracts (particularly that of January 17, 1911), and instantaneously vested the ownership of said stock in the four brothers as joint tenants.

(e) Independent of said contracts the assignment of said stock in blank and the deposit thereof in said common or joint depository constituted an effectual assignment instantaneously, of his individual stock by Charles Fleming to his surviving brothers and vested the property in said stock in them jointly pursuant to their original joint arrangement.

(f) Independent of the written contracts including particularly that of January 17, 1911, and independent of any other express contract, the assignment of said stock in blank and the deposit thereof in the common depository accessible to his surviving brothers by Charles Fleming was good as a gift inter vivos.

(g) Whichever of the foregoing views of the transaction be adopted, the 2,500 shares of stock in Fleming Brothers, Incorporated,

issued to Charles Fleming, endorsed in blank by him and deposited by him as aforesaid, were effectually cut off from his personal estate and the plaintiff can neither have nor effectually claim any dower or distributive interest therein.

McKinnon v. McKinnon, 57 Fed. 409;

Wood v. Logue, 167 Iowa, 436; 149 N. W. 613.

171 & 172 As to formalities involved in transfer of stock.

Cook on Corporation, 7th Ed., Vol. 2, p. 1152, §§ 373, 374;

Tucker v. Tucker, 138 Iowa, 344;

Pyle v. East, 173 Iowa, 165; 155 N. W. 283;

Larimer v. Beardsley, 130 Iowa, 706;

Candee v. Conn. Sav. Bank, 71 Atl. 551;

Dickerson's Appeal (Pa.), 8 Atl. 64.

Reese v. Philadelphia Trust, Sav. Etc. Co., 67 Atl., 124;

Gilkerson v. Third Ave. R. Co., 63 N. Y. S. 792, affirming opinion by referee, Roger A. Pryor.

173

Proposition IX

The opinion and decree of the trial court seem to be bottomed upon the thought that the contracts in controversy are void as being against public policy. In reaching this conclusion the trial court has disregarded the rule that contracts will not be declared void as against public policy except in cases free from doubt.

Richmond v. Ry. Co., 26 Iowa, 191, 202;

Barrett v. Carden, 65 Vt. 431; 26 Atl. 530; 36 Am. St. Rep. 876;

Livingston v. Ry. Co., 142 Iowa, 404, 408, 410;

Baldwin & Co. v. Moser, 123 N. W. 989;

Cole v. Brown-Hurley Co., 139 Iowa, 487.

Proposition X

Contracts are to be construed as legal rather than void.

Alfree v. Gates, 82 Iowa, 19, 22;

Maxwell v. McCall, 145 Iowa, 687;

Wis. Lbr. Co. v. Tel. Co., 127 Iowa, 350;

Cole v. Brown-Hurley Hwde. Co., 139 Iowa, 487.

174

Proposition XI.

A contract will be enforced as the parties have written it.

Rapp v. Linebarger, 149 Iowa, 429, 439;

Streator Clay Mfg. Co. v. Henning Vineyard Co., 176 Iowa, 297;

Peterson v. Brotherhood, 125 Iowa, 562.

BRIEF AND ARGUMENT FOR APPELLEE

[Filed December 3rd, 1918.]

(Portions Stipulated to be Deemed Material.)

This case presents questions that are absolutely new in the State of Iowa, and is a case that we have been unable, after searching the indices of all of the law reports of the English speaking countries, to find a case on all fours therewith so it will be safe to say that it presents questions that have never yet been passed on by the courts of last resorts of any tribunal administering the common law. We do not mean to say that here and there scattered thru the case are not propositions that arise that have not been passed upon, but we do mean to say that the case as it stands, presents a combination of facts never before presented to any of the courts of last resort in the English speaking world.

Counsel in argument has amply presented, it seems to us, every possible phase that would lead to a different conclusion than that reached by the court below. Many of them far-fetched; many of them perfectly logical but based on facts different than the facts here. He has undertaken, and skillfully too, to weave a sort of glamor about the case by talking about family compacts and the relations that existed between the Fleming Brothers and the other members of the family and that the contracts in question herein are simply an out-growth of those former relations and written evidences of it and to read the argument without a knowledge of the facts lying back of it and to take the view, that counsel undertakes to impress, we would be led into the erroneous conclusion that this family—like the various Royal families in Europe—has family statutes, customs or traditions which sets it apart from the common herd and make it a law unto itself and excuses it for undertaking to carry out, with the aid of skillful lawyers, a scheme contrary to the general public policies of this state.

We see nothing remarkable in this family history that is disclosed by the testimony prior to the making of the so-called compacts or contracts that were drawn by Judge Lenahan of Dubuque, and they were subsequently substituted by the one drawn by Mr. N. T. Guernsey of Des Moines, Iowa. The record presents a history of a very ordinary family in very moderate—we might say—straitened circumstances. The elder Fleming, the immediate progenitor of the four brothers involved in this action located somewhere in Michigan and purchased a mill and troubled along, we are justified in the presumption, heavily in debt and we find that after his death thru the debts of the estate the family lost all the property it had. We find that at the death of the father, the eldest son, Robert, one of the defendants herein, was not yet 22 years of age; that Charles, the deceased, whose widow is now contesting for her rights as such, was then about 19 years of age and the other two were younger. It seems they all worked along and

received no wages. This is nothing remarkable for an American family; nothing remarkable for any family. That a family consisting of four boys and one girl, father and mother, should all work together under the guidance of the father and mother for the family interests and it seems to us to be going back a good way and indulging in a rather far-fetching conclusion that any family compact was ever entered into or could have been entered into under such circumstances, or that it could be inferred or that the evidence would justify the inference that such was the case. Neither do we find it in anyway remarkable that the four boys, after the death of the father, struggled along with the business in Michigan and under the guidance and headship of the mother under-

178 took to save what they could save out of it and that subsequently when this property left by the father, was lost, that there should be somewhat of a separation of the family each going off and seeking different occupations; that each should have an interest in the other; that they should adjust their affairs and get together and enter into some sort of a business arrangement.

Let us examine the record and see just what there is back of this imaginative, remarkable Fleming family compact. The testimony of Robert J. Fleming begins on page 241 of the Abstract and examining that we find the family lived at Coberg, Ont. September 2nd, 1856, the date of Robert's birth, and lived there for about eight years thereafter. The elder Fleming, being a miller by trade, afterwards removed to Williamston, Mich. with his family and died in 1878 leaving the property, consisting of the grist or flour mill, saw mill and about 80 acres of land adjoining owned by the elder Fleming and a Mr. Mead—presumably in partnership with Mr. Fleming in the conduct of the business—and we find that the business was subsequently conducted under the name of Geo. G. Mead, survivor for himself, and Stanhope Fleming. The death of the father left the family consisting of his widow and four children; Robert then about 22 years of age; Jennie Fleming born next to Robert; Charles not yet 19 years of age; John younger and Stanhope still younger and to develop further the theory of this remarkable compact, group or family arrangement on page 212 of the Abstract, Mr. Miler asks the question as to what the arrangement was between the members of the family during that period and we find that the whole family worked together and everything they had went into a common pot;

179 everybody had the same work to do and that the business was run under the style of Geo. G. Mead, survivor, etc., until sometime in 1884 when a partnership was made, a considerable creditor named Grimes coming in and all of the Flemings taken in, except Stanhope, not yet of age; Mr. Grimes making a contract with the Flemings that they were to pay the debts that were owing him with interest thereon and if they did not do it within six years—he was to have one-half the property. The business failed in 1885 and the testimony is that all of the debts were not paid until the last few years before the trial of this case below.

Charles, who was married July 4th, 1881, he not then being of

age, and whose wife we find by reference to her testimony was then past 20 having been born November 3rd, 1860. But one child was ever born to Charles and his wife and that was November 22nd, 1882, and died the following January. (Abst, p. 38.)

Turn again to the history of the Fleming family as related by Robert and beginning at page 213 of the Abstract we find that after Grimes and Flemings failed about the middle of April, 1885, Robert—who in the meantime had been married and his wife died after two years' married life—went up to Minneapolis and worked there for some lumber firm and in the fall of the year first took up the insurance business, having been joined by John in 1886, John, being a bachelor, having no wife to keep him home. In 1887 the four brothers went into the railroad business purchasing for that purpose some teams, harness, wagons, etc. and first worked on the Great Northern R. R. North Dakota and in the fall of 1887 moved their outfit near Marshall, Minn. engaging in railroad work and when winter came made arrangements to winter their outfit at the last named town. The financial results from the railroad business were not satisfactory and in February, 1888, Robert and John came to Dubuque with the Mutual Insurance Co. agency. Charles remained wintering with the railroad outfit at Marshall, Minn. and as they had decided, probably, to quit the railroad business commenced trading the horses for equities in pieces of land and getting rid of the outfit and it seems that Robert and John took in wagons and other property on insurance commissions and shipped them to Charles, who dickered the stuff off. The testimony recites that they were constantly making remittances to Charles and that when he would take a note for a team or anything like that the note would be sent down to the two brothers at Dubuque and that during this time the younger of the four brothers, Stanhope, remained in Michigan collecting up some old accounts, etc. In 1888 the mother, Lennie and the plaintiff along with Stanhope were brought to Dubuque and Charles came down there to visit. That they all set up housekeeping together, except Charles who with his wife returned to Marshall, Minn. and the business was carried on as he had been carrying it on before. In 1895 Charles had cleaned up the Minnesota enterprise and he then came to Des Moines where Stanhope had come in 1891. From 1893 the business had an agency with the Mutual Life Insurance Co. of New York, the control therefor was in the name of Robert J. Fleming and continued such on a commission and renewal basis until Dec. 31st, 1905.

In the meantime, in October, 1894, Robert was married again and as the fruits of that marriage there are two children, Charlotte born November 5th, 1895 and John, April 11th, 1897. On the 14th day of December, 1896, the four brothers entered into the first written contract that ever had been made between them in reference to their business, which is set out on page 5 of the abstract and subsequently this was modified by the contract set out on pages 6 and 7 on the 23rd of January, 1897, and later on the 17th day of January, 1911. The instrument Exhibit 103, pages 8 and 9 of the Abstract, was executed and it is about these instruments and

the interpretation thereof and the rights thereunder that the principal questions in this case center. In speaking of the execution of the last instrument Mr. Robert Fleming on page 222 says that when they got the first contract and digested it and found the real piece of property they had was still in his name and that his brothers would have to settle with his wife in case of death, they drew up a second contract. These brothers went ahead and did business for a number of years finally building a colossal structure in Des Moines and incorporated for that purpose as Fleming Brothers. The corporation having \$500,000.00 in stock issued, \$125,000.00 was issued to each of the four brothers. This stock when issued was endorsed in blank and placed in an envelope and this envelope in turn placed in a box in an apartment in the safe in the Fleming Bros. office in Des Moines equally accessible to each of the four brothers. The matters continued in this shape until the death of Charles January 15th, 1916. Quite shortly after his death, he leaving surviving him this plaintiff as his widow, in fact a little less than a month, February 14th, 1916, Robert, John and Stanhope went to the office of Judge William E. Miller and brought the three contracts set out in the pleadings and introduced in evidence, Exhibits 101, 102 and 103, with them and conferred with him as to the situation. (Abst.

182 Pages 206 and 207), and had several conferences with Judge Miller in reference to the same and finally about the 10th of April, 1916, Mr. Miller prepared the deeds, affidavits, petition for appointment of administrator introduced in evidence and on the 11th day of April was called to the office of Fleming Bros., where he found the three brothers and the plaintiff and these instruments were signed. About the circumstances of signing of which and the surroundings leading up thereto there is considerable conflict of testimony, but in view of the fact that no claim is made that these instruments affected the matter directly, this conflict is not material. We find Mr. Miller, on page 208 of the Abstract in the Answer to three interrogatories, taking these instruments as such out of the case.

The family compact claimed herein then so far as there is any shadow of claim for its existence rests entirely upon the Exhibits 101, 102 and 103 and upon nothing else. The father, as all fathers should perhaps, taught his children that it was their duty to stand together and be interested in one another's welfare. There is nothing in the record that shows that he ever had any idea of any such claims as are now put forth by the defendants' attorney. It would be a monstrous injustice to the memory of any man that he should have such. That he would undertake to teach his children, each of whom he might look to as in the future founder of a family with wife and children, that it was their duty not only to pool their earnings, but to so arrange those earnings that the family of the one dying first should have to depend solely and entirely upon and resort to a fund in the control of others, perhaps having families of their own without legal method whatever of enforcing their claims for support.

183 Neither is it conceivable that upon the death of the father that any such a compact was entered into. There was but one of the descendants of the elder Stanhope Fleming who was at

that time capable of entering into a contract. Robert was not yet 22 years of age. None of the others had yet arrived at the age of maturity. Charles was not 19. To enter into a compact of this character required contractual capacity at least, so we find there is nothing in that feature of the so-called family compact.

The evidence recites that while Charles was at Marshall and Stanhope at Des Moines, and Robert and John at Dubuque they constantly made remittances to him, etc. The evidence also shows that whenever they sent him property of theirs to be disposed of, he sent the notes back and the remittances were made back and forth between the brothers. Therefore, it simply shows what would ordinarily take place between even strangers in blood where such business relations exist as existed between these men. They had a lot of property they owned in common which was being taken care of by Charles at Marshall and disposed of for the benefit of all. He was devoting his time to that. They were trying to get out of the "box"—we might say—they had gotten into in the railroad work where they lost money and the others were opening up new avenues of business and devoting their time to that. Each, of course, was furthering the common interest, and there is no record—nothing to base any claim of any compact until Exhibit 101 is drawn and that, it will be noted, was after Robert had been married the second time and a child had been born to him; when it was evident, probably, so long a time having elapsed that Charles would have none; when John and Stanhope had not yet entered into any relations which gave promise of any future successors, so the language of counsel in arguing as to this remarkable family compact, while perhaps vividly descriptive of an idyllic dream, brings up no nearer to the solution of the questions involved in the case.

The only compact that can be found from the record is the compact, Exhibits 101, 102 and 103 set out in the Abstract pages 5 to 9 inclusive. On the 14th day of December, 1896, the four brothers signed Exhibit 101 and subsequently on the 23rd of January, 1897, executed Exhibit 102. These two contracts or declarations, or whatever they may be called, undertook—in our view—to place the property of the Fleming Brothers in such shape as between themselves they could each enjoy every incident of ownership, yet, at the death of one that ownership passed to the others. They were drawn by Judge Lenahan of Dubuque. Subsequently, January, 1911, the four brothers entered into another contract—which in our view—took the place of the first two and created a general partnership between the brothers with some of the same incidents included that were expressed in the previous contracts. To our view, the last contract, Exhibit 103, is a contract of partnership. It recites the ownership of the property which had been theretofore acquired and declared in full the terms upon which it would be held in the future. It was one of the peculiarities of Mr. Guernsey that any contract or other instrument drawn by another lawyer that was ever submitted to him that he did find a better way, in his judgment, to do what was undertaken to be done in the contract and in drawing this con-

tract, it was and could only have been his intention to regulate in full the relation of the four brothers to one another in their property matters in the future. That it was a partnership contract there can be no question. Had the instrument not have been drawn by one skilled in the law—there might be some room for argument—that the frequent use of the terms “partnership,” “firm” and the phrases in connection with which these words were used did not evidence an intention to draft articles of partnership agreement, but to say a man with a standing of N. T. Guernsey in the legal profession did draw such a contract as Exhibit 103 using the word “partnership,” at least eight times; using the word “firm” both in connection with the name and in connection with the property and not have the intention and the understanding that he was thereby creating a partnership, is inconceivable. Neither is it conceivable that men of the business experience of the Fleming Brothers, having to do as they did all the time with technicalities in drawing such contracts as policies of life insurance and carrying on the business they had carried on did sign such an instrument as Exhibit 103, and would have done so without an understanding it was creating a contract of partnership. In other words, we have a contract here that in at least eleven different places used words and phrases applicable only to a partnership drawn by one of the most skillful lawyers ever practicing at the Iowa Bar, signed and executed by four men, each of whom was skillful in the use of language and the making of contracts and conversant with the niceties of language with which to properly express ideas, drawing such a contract and it now being contended that the thing thereby created was not a partnership.

What was it that these men undertook to build up under this contract? What did they undertake to create? Who owned and did own the property that had accumulated or could accumulate? Is it true that they could by a declaration of this character so fix their property that neither of them owned an interest therein and yet that intangible something they undertook to make did own it? That something was not a corporation and the contention now is that it is not a partnership. They undertake to say that the only interest that either shall have in the business is what he is drawing out. That the accumulations, whatever they may be, belong to this thing that you have created. Who, then, was the legal entity who did own it, the partnership as distinguished from the assets? What were the rights of each of the brothers therein? Let us suppose that one of the four, say Robert for instance, commits a tort of such a character as to subject himself to a suit in court and that a judgment, say for \$100,000, is rendered against him thereon and the holder of that judgment undertakes to subject Robert's interest in this estate or the accumulations of the partnership, or whatever you may call it. By the provisions of these contracts Robert has no interest at all. No creditor can reach it; the only interest is the interest that he himself may draw out. Now if Robert can do this and this is true as to Robert's interest—it is true as to the interest of Charles; true as to the interest of John and true as to

the interest of Stanhope. Here then you have a something unknown to the law created in which there is a vast accumulation of property owned by no other people on earth, then these four men—no one else having an interest therein. The property reaching probably the Million dollar mark or more and it being impossible for a creditor to reach or to take any part of it, so that the individual debts

187 of each of the four parties—who are the only parties on earth who can own this property—can not be collected from any other source. How long would this plea last in a court of

justice undertaking to reach and subject the accumulations of this institution to the separate debts of the constituent members thereof? About as long as it would take the court to render a decree, after hearing the testimony. There is no limit upon what either of the four brothers may draw out. No limit upon what he may take for himself out of the common fund. You have then an accumulation of property here gotten together by the joint efforts of four brothers, each of whom may take whatever he desires for his own use; each of whom may have his interest therein subject to the payment of his debts. In other words, each of whom may during his whole life exercise dominion over the property and have all of the benefits of the same. In reality own his share in it and at the instant that life leaves his body, his estate is such—so far as this accumulation is concerned, his share of which a moment before was worth a quarter of a million, that an appointment of an administrator is unnecessary, and his widow—who has lived with him as his wife and assisted as wives do in performing the household duties, etc., in these accumulations is relegated to the other three members of the combination for charitable support; that for her sustenance they may dole out to her such sums as they may see fit to give; that she has no legal right that she can enforce and that even her expectation of a provision by a bounty of the remaining three is that should she survive them she will then be dependent upon the bounty of the surviving children of any one of them and if no children survive, some collateral relative may come in and take the whole accumulation and she be left

188 absolutely penniless on the world without even anyone to look to that she may receive that which is justly due her of the property accumulated by her husband. We do not believe that it is possible to create such an institution. We do not believe that this court will ever say that where an individual like Charles Fleming was a member of a co-partnership—such as this was—with the right to help himself during his lifetime to a full share of the partnership property, to have his creditors come in and take it and not be liable to an accounting therefor to the other members, can so fix his property that he can deprive his wife of an interest therein while he enjoys these rights himself up to the moment his breath leaves his body and as that breath leaves his body it changes from a man worth a quarter of a million to a corpse without any legal liability on his accumulations of a lifetime to pay for his coffin and see that the last rites are performed over his body and that his widow is turned adrift upon the world the object of an uncertain charity.

The language of the contract is that upon the death of either one of the undersigned, the property owned by the said partnership including all property standing in the names of the individual partners—which embraces certain stock in said Fleming brothers corporation—shall be and become the property of the surviving brothers of said partnership and all that said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein. In other words it remains his but as the last breath leaves his body it becomes theirs. So it would with a Will so this provision is certainly testamentary in character.

189

Propositions

Proposition 1. The contract between the Fleming Bros., so far as it undertook to take the interest of one at his death and pass it to the others, is testamentary.

Burlington University vs. Barnett, 22 Ia. 60-92; Am. Dec. 376;

Tuttle vs. Raish, 116 Ia. 331;

Wilson vs. Carter, 132 Ia. 442;

Lever vs. Gauss, 62 Ia. 314;

Babb vs. Harrison (S. C.), 70 Am. Dec. 203;

Castor vs. Jones, 86 Ind. 289;

Gomez vs. Higgins, 30 So. 417.

Proposition 2. The provision for forfeiture of the interest of the partner by death or withdrawal is a penalty and hence the partnership existing between the Fleming Bros. could have been dissolved at any time by one of the brothers retiring and his interest was not forfeited.

Becker vs. Hill, 20 Lancaster Law Review 345 (Pa.).

Proposition 3. Where a provision in a contract is a penalty, the courts will enforce it only as to the actual damages.

Elzy vs. City of Winterset, 172 Ia. 643.

Proposition 4. The law looks with disfavor on attempts to deprive the wife of her rights in the property of her husband.

Collins vs. Collins, 98 Md. 473, 103 A. S. R. 408;

Beere vs. Beere, 79 Ia. 555;

Beechley vs. Beechley, 134 Ia. 75;

190 Higgins vs. Higgins, 109 A. S. R. 316, Ill.;

Thayer vs. Thayer, 39 Am. Dec. 211.

Proposition 5. It always has been and is now the policy of the laws governing Iowa, that the widow shall take her share of the property owned by the husband at the time of his death.

Sec. 2, Ordinance of 1787.

Sec. 3366, Code 1897;

Sec. 3362, Code 1897 and in corresponding sections in previous codes.

Proposition 6. In a gift the donor must part with title and dominion over the subject of the gift.

Vosberg vs. Mallory, 155 Ia. 165;

Pyle vs. East, 173 Ia. 165;

Oliver vs. Perry, 131 Ia. 654;

Casteel vs. Flint, 112 Ia. 92;

Stokes vs. Sprague, 110 Ia. 89.

Proposition 7. Charles Fleming died seized of a fourth interest in the Fleming Bros. partnership.

Moore vs. Bare, 11 Ia. 198;

Hewitt vs. Rankin, 41 Ia. 35;

Rowley on Partnership, 291-2.

191 APPELLEE'S REPLY (TO A REPLY BY APPELLANTS)

[Filed December 10th, 1918.]

Appellee's and Plaintiff's Reply

192 As by the rules of equity on an appeal the plaintiff of the court below has a right of the opening and closing. We think we need no apologies for filing this brief memorandum herein. Also in view of the somewhat extraordinary course this argument was taken, comments by Mr. Cummins, a letter of Mr. Guernsey attached to and set out in the argument—we believe we have some right of reply. That this case is of importance and great importance is evidenced by the fact that the defendants, appellants herein, are able to reach into the United States senate at a time that the issues growing out of the great war are to be settled and Mr. Cummins is pressing the resolution to restore telephonic communications between the Peace Conference and the senate and to see that the extraordinary course is pursued of having eight United States senators cross the Atlantic that they may observe whether or not the president performs his constitutional functions in negotiating treaties that are to be submitted to the senate for ratification and to cause him to appear after 15 years' absence from the courts of the state of Iowa in this case, warrants us in a conclusion that we should leave no stone unturned to present our views to this court and that they may be in writing to be read by the court. Also in view of the fact that the extraordinary course is pursued of attaching to the argument a letter from Mr. N. T. Guernsey, counsel for the great telephone trust, who left Des Moines with an annual salary far exceeding the competence that ninety men out of every hundred are unable to accumulate in a lifetime, our desire to have our views fully presented to this court, are somewhat augmented.

The complaint is made, both in the comments of Mr. Cummins and in the argument of Mr. Miller, that the subject of joint
193 tenancy was not mentioned in our original brief and Mr. Miller also comments very sarcastically upon one of the cases cited by us in the brief claiming that he was unable to find it. It

may be possible that he was, but the writer found it and found it in the Iowa State Law Library at the State House and cited it as a decision of a *nisi prius* court, not claiming that it was controlling, but that at least, if the reasoning was good, might be persuasive as to the point cited, and in the absence of authority in the courts of last resort, we think that such citations are admissible. As to the question of our not discussing joint tenancy we did not believe that a joint tenancy had been shown in this case. We believe also, even if an attempt had been made to show joint tenancy, that tenancy was simply a part of the contract that they had to permit each member of the so-called brotherhood to enjoy during his whole lifetime all of the property that he accumulated and at his death have it disappear so that his wife could have no part of and no part in it, so she might be relegated to the uncertainty of whatever provisions the survivor or their survivors in the event of her surviving them might make for her. Further than that, we contend in this case that no joint tenancy was ever created by the instruments in question and particularly by the last instrument and our argument was along that line. What did each of the brothers own in this partnership? Each owned an interest in the partnership. The partnership, they say, owned the property. All partnerships own their property. The partner's right therein, is a share of the equities therein that may be left on the closing up of the affairs of the partnership, i. e. Paying of its debts and the adjustment between the parties. This interest Mr. 194 Charles Fleming owned, held and controlled and enjoyed the benefits and reaped the emoluments therefrom until death took him away and at that instant they say all of his right ceased and determined, and not until then, so perhaps this might be true in a real joint tenancy.

Joint tenancies are not favored by the law. Ordinarily they are confined to land. Yet it is possible to claim a joint tenancy perhaps in personalty. This matter was earlier before the courts of this country. In Kentucky, in 1814, in the case of *Hart vs. Hawkins*, reported in 3 Bibb, 522, in 6 American Decisions, 666. The court say, "The rule in this respect seems to be, that the right of survivorship is never allowed, wherever the partnership is for the purposes of trade, or the undertaking is in the nature of merchandising upon the hazard of profit or loss."

Joint tenancies were products of the English law. There resulted the feudal conditions calculated to carry that out and formerly it was held that all partnerships, unless contrary provision was made, were joint tenancies, whether in lands or personalty; but while we were yet subjects of England in 1683 their High Court of Chancery in *Jeffries vs. —*, 1 Vernon Ch. 217. "Two persons having stocked a farm and occupied it as joint tenants and one having died, there was a bill brought to relieve against survivorship. It was proven in the case that the deceased was informed what the consequences of the law were if he should die and he replied that he was contented that the flock should survive. The Lord Keeper was clearly of the opinion that the plaintiff ought to be relieved, that if the farm had

195 been taken jointly by them, and proved to be a good bargain, the survivor should have the benefit of it but as to a flock employed in the way of trade—they should in no case survive."

After discussing how the law merchants had modified the common law, as it heretofore existed on this subject, they further said: "When two persons become joint tenants or jointly interested in a thing by way of gift, or the like, then the same shall be subject to all of the consequences of the law; but as to a joint undertaking in the way of trade, or the like, it is otherwise, and decreed for the plaintiff accordingly."

Again in 1732 the High Court of Chancery of England in *Lake vs. Raddick*, 3rd P. Williams, 157, had before it a case where a lot of lands overflowed by the Thames River and the commissioners had assessed taxes to pay for improvements and the land owners abandoned the land and the commissioners conveyed them to five gentlemen, who undertook to improve them. The question of joint tenancy arose. It was originally contemplated that a large sum of money should be expended in the improvement of these lands by the purchaser to keep the river from overflowing and to reclaim them. A bill was brought by plaintiff for an accounting and division of the partnership assets. The Master of Rolls on debate decreed that survivorship should not take place and that the payment of the money created a trust for the purpose of advancing the same and an undertaking on the hazard of profits or loss was in the nature of merchandising where the right of survivorship in the *jus accrescendi* is never allowed and on appeal the decree of the Masters of Rolls was affirmed.

Such was the state of the common law that we inherited from England. That is that in undertakings in the way of trade 196 and the co-partnership under discussion in this case was the undertaking in the way of trade—the rules of joint tenancy can not and do not apply. The right of survivorship does not exist. Hence, a joint tenancy could not be created; hence, any interest that would be conveyed by the contracts passed only at death. Mr. Miller in his argument urges that it was a consideration of the contracts in question.

As the contract is testamentary in character and all that, we think there can be no question that a consideration was paid makes no difference. *Lever vs. Goss*, 670 Iowa, 314, decides that.

So after we have carefully read the observations of the eminent Senator who the counsel in this case seemed to believe in his person revived the office *jure consult* known to their own law and after we have read the letter of Mr. Guernsey, who these gentlemen undertake now to say or intimate rather in using the words "partnership," "firms," "Contracts" and matters of that sort, should have applied to his legal work the rule that might be applied for one not skilled in the law to draw an instrument, and after we have read the enlightening argument of Mr. Miller, counsel in the case, in the vain hope that he might find the case of *Becker vs. Hill*, 20 Lancaster Review, 345, recited by some great ancestor of his and after we have taken full account of the confidences that these gentlemen express that

their view of the law will not be shocked by this court, we are still of the opinion that the instrument in question is testamentary in character; that it never created a joint tenancy and we have even heard of eminent counsel before who were shocked at the opinions of the court—which opinions stood the tests, criticisms and analysis and are still today controlling.

197 With these few observations, we rest the case to your Honors.

Respectfully submitted,

Parsons & Mills, Attorneys for Appellee.

198 APPELLANTS' PETITION FOR REHEARING

[Filed February 5th, 1920]

(Portions Stipulated as Being Deemed Material)

199 The opinion in this case affirming the decree of the district court of Polk County, Iowa, against the defendants was handed down December 16, 1919, and is reported in 174 Northwestern Reporter, 946, in the Advance Sheet issued January 9, 1920.

Petition for Rehearing

The appellants,—defendants below—respectfully petition this court for a rehearing of this case on the merits upon the following grounds and for the reasons hereinafter set forth:

Grounds for Reversal

I. The majority opinion and the decree which it affirms deprive the defendants of valuable vested and contract rights in violation of constitutional guaranties; that is to say:

(a) Whereas the contracts in controversy (being working agreements operating in present upon valuable consideration under which defendants and their brother, plaintiff's deceased husband, jointly accumulated an estate not of inheritance but in the nature of a joint tenancy with the right of survivorship) were lawful when made and while in operation during the lifetime of the deceased, under Chapter 2, Title XVI and Sections 2923, 3362 and 3366 of the Code of Iowa and under *Stewart v. Todd*, *Baker v. Syfritt*, *Vosberg v. Mallery*, and other decisions of the Supreme Court of Iowa hereinafter cited:

and

(b) Whereas, under said statutes and the decisions of said court construing them dower did not attach to the estate so
200-202 created and

(c) Whereas, by judicial legislation the decree and decision create a dower estate in plaintiff where none existed under the law so laid down, and carves it out of the joint estate vested in the

defendants, in violation of the express terms and plain intent of the contracts

Therefore the decree and decision; (a) Impairs the obligation of the contracts in controversy contrary to and in violation of the the rights of the defendants under Article I, Section 10 of the Constitution of the United States, and Article I, Section 1, Constitution of Iowa: and (b) Deprives the defendants of property without due process of law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(As to the jurisdiction of the Supreme Court of the United States in such case, on writ of error to this Court, see *Muhlker v. N. Y. & H. Rd. Co.*, 197 U. S., 544 and other like cases.)

(See also Ground II post of this petition.)

203 Propositions, Points, and Authorities in Support of the Petition for Rehearing

I.

(A) The contracts in controversy created and provided for a right of survivorship in the defendants analogous to that right as it exists in joint tenancies. This right of survivorship and all the consequences flowing from it were lawful and in harmony with public policy when the contracts were made. They continued to be lawful and in harmony with the known public policy of this state to and including the time of the death of Charles Fleming, indeed down to the time of the filing of the decision in this case.

Wood vs. Logue, 167 Ia., 436; *Ann. Cas.*, 1917B, 116;

Baker vs. Syfritt, 147 Ia., 49, 62;

Stewart vs. Todd, 173 N. W., 619, decided by this court, July 10, 1919;

Vosberg vs. Mallory, 155 Ia., 165;

Haulman vs. Haulman, 164 Ia., 471;

Lunning v. Lunning, — Ia., —, 168 N. W., 140;

Metler vs. Metler's Admrs., 19 N. J. E., 457;

McKinnon vs. McKinnon, 56 Fed., 409;

Smith vs. Douglas County, 254 Fed. Rep., 244;

Ann. Cas., 1917B, p. 57. Note, "Nature of Estate Resulting from Creation of Cotenancy."

204 & 205 (B) Since the contracts in respect to the provision for survivorship and otherwise were valid and in accord with public policy when executed and while being performed, the change in the public policy of this state (announced for the first time in this decision) is immaterial; and the decree and decision in the case at bar are an invasion and destruction of the contractual and property rights of the defendants repugnant to the constitution of the state. Art. 1, Sec. 1, and Art. 1, Sec. 10, U. S. Const., and XIV Amendment U. S. Const., Sec. 1.

Cooley's Principles of Constitutional Law, p. 313 (Edition of 1883);

White vs. Hart, 13 Wallace, 646;

Delmar vs. Insurance Co., 14 Wallace, 661;

Swan vs. Seemans, 9 Wallace, 254;
 Coppage vs. Kansas, 236 U. S., 1, 14;
 Cole vs. Brown-Hurley Hdwe. Co., 139 Ia., 487;
 Hunter vs. Coal Co., 175 Ia., 245, 271, 286.

Accordingly statutes expressly abolishing joint tenancies have been denied retroactive effect.

(Cal.) Dewey vs. Lambier, 7 Cal., 347;
 Greer vs. Blanchard, 40 Cal., 194;
 (Ky.) Barclay vs. Hendrick, 3 Dana, 378;
 Overton vs. Lacy, 6 T. B. Mon., 13, 17 Am. Dec. 111;
 (Kan.) Best vs. Tatum, 78 Kan., 215, 96 Pac., 140.

206 & 207 (1) The decision and decree violate the contract clause of the Constitution of the United States, Art. I, Sec. 10, in that a contract valid when made, going into effect instantaneously as an operating agreement and providing for survivorship and what is essentially a joint tenancy is declared void because of a newly discovered public policy newly and now for the first time declared which is contrary to the former decisions of this court.

Muhlker vs. New York & Harlem R. R. Co., 197 U. S. 544;

and

(2) The decree and decision deprive defendants of property without due process of law in and for that the interest which the decree and decision create in the plaintiff, viz., about one-eighth of the joint estate, is to be and must be carved out of the estate which pursuant to valid contracts (under law heretofore existing) vested in the defendants absolutely, as against the plaintiff, upon the death of Charles Fleming. This, in violation of the law of this state as settled in the authorities and statutes hereinbefore cited, and in contravention of the Constitution of the United States, fourteenth amendment, section one. (See also Ground 1 and Proposition I and subdivisions thereof.)

208 APPELLEE'S RESISTANCE TO PETITION FOR REHEARING

[Filed March 10, 1920. B. W. Garrett, Clerk Supreme Court of Iowa]

209 After an examination of the petition for rehearing, Appellee's attorneys at first concluded to file a motion to strike the major part of the same, for the reason that on the rehearing it undertakes to drag in questions not raised or argued on the original submission, but after reflection concluded that the objections to the petition for rehearing could as well be made in this form as by motion to strike. That a motion to strike would be sustained, seems to be pointed out in the State vs. Thomas, 173 Iowa, 408, we apprehend that the petition in so far as it undertakes to raise questions not proper to consider now, may be made by an objection to the consideration of those questions.

The petition undertakes to present questions arising under the

Federal Constitution for the first time in this case. It undertakes to present them partially by holding out the thought that it is practically judicial legislation for this court to decide as it did. This case was tried before Judge Dudley, and no question of a Constitutional character was disclosed by the record that came up from that court. Judge Dudley rendered a written opinion in the case and his written opinion is a part of the record in this court, and will be found in Appellee's amendment to Abstract of Record, beginning on page six and ending on page thirty. There is nothing in the opinion assailed in the petition that is not a practical affirmation of Judge Dudley's findings and his opinion, so that every question that could arise upon the opinion assailed in the petition arose on Judge Dudley's decision in the court below, therefore, the claimed Constitutional questions now for the first time attempted to be injected into the case, not only existed but were proper matters of defense before Judge Dudley, and they existed in this case as they exist now.

210 When Judge Dudley filed his opinion they were as obvious then as now and if proper questions, should have been presented in the original presentation to this court.

This court has certain rules of practice. Rule 53, Subdivision 5, in treating of matters that should be set out in the presentation of cases to the Supreme Court by the appellant in his argument makes certain requirements as to what shall be set out in appellants' opening argument. Subdivision 5 of Rule 53 of the Statutes and Rules of this court is:

"The errors relied upon for a reversal. Following this the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. When textbooks are cited the number or date of the edition must be stated, with the number of the volume and the page or section. No alleged error, or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or in petition for rehearing."

The propositions called for in this rule are set out in appellants' brief and argument, commencing at page 71 and ending at page 82, and though we have carefully re-examined the fourteen propositions or points in this brief, we fail to discover anywhere therein anything that can be tortured even into the semblance of raising any of the Constitutional questions now attempted to be injected into the case. The query naturally suggests itself, why are these now raised? The lawyer who wrote the petition for rehearing is an able lawyer. He knows what a rule means when he reads it. The rule says 211 "No alleged error or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument or on petition for rehearing." Or in other words, the able counsel for appellants with full knowledge of

the foregoing rule, is now undertaking to get a decision of this court on questions suggested for the first time, and not in the points or propositions contained in the original argument, but raised for the first time in a petition for rehearing.

To do this, is to ask this court, to throw its rules to the wind, to ignore them, to go absolutely contrary to them, and that, where the rule is so plain that no room for construction is left of the language used. Not only that, but this court is asked by this petition for rehearing to ignore a rule that had been established as the law of this court by its own decision prior to the formal promulgation of Rule 53, and which is in substance the rule of about every appellate court that has ever had to consider the question in connection with a petition for rehearing.

A proposition not raised as required by rule 53, will not be considered by the court.

Lamkin vs. Lamkin, 177 Iowa, 584-99.

An attempt to raise a new point, or take a new position after filing original argument may be met by motion to strike.

State vs. Thomas, 173 Iowa, 408.

Appellant must fully develop his statement of legal points or propositions in his original brief and argument, or they will not be considered.

Dodge vs. Grain Shippers, 176 Iowa, 316.

212 We cite these cases, not that the rules need any interpretation, but merely as a reminder that this court has since the promulgation of the rule adhered to it.

Without any reference to rule 53, and as an original proposition according with the laws generally laid down by appellate courts, this court has always held that it was not proper to allow on rehearing matters to be insisted upon, that were not presented on the original hearing.

Hintrager vs. Hennessy, 46 Iowa, 600-4;

Tubessing vs. Ottumwa, 68 Iowa, 691-4.

Going into other States we find unanimity in the decisions that speak well for the soundness of the rule.

The general rule is that questions not presented and discussed upon the original hearing, will not be considered upon a petition for rehearing.

Henderson vs. Huey, 45 Ala. 275;

Grogan vs. Ruckle, 1 Cal. 193;

U. P. Ry. Co. vs. Colorado Postal Telegraph Co., 30 Col. 133—69 Pac. 564;

Hine vs. Clancy, 9 Ill. App. 190;

Mauer vs. Board of Commissions, 36 N. E. 1101 Ind.;

State vs. Coulter, 40 Kans. 673—20 Pac. 525;

Succession of Broom, 14 La. Ann. 67;

Phipp vs. Mo. Pac., 196 Mo. 321—95 S. W. 410;

Powell vs. Nev. C. & O. Ry., 28 Nev. 305; 82 Pac. 96;

McDonnell vs. Carson, 95 N. C. 377.

For further cases see *Century Digest*, Vol. 3, Sec. 3243, Appeal and Error, also *Dec. Dig.* Vol. 1, Appeal and Error, Sec. 835 (2).

Again the question naturally arises in the mind, why in
213 the face of such a unanimity of decisions will counsel present these propositions?

The answer is found in an examination of the decisions of the United States Supreme Court hereinafter cited. A consideration of the rules therein laid down and a consideration of the fact that, clients in this case appear to be ready not only to make a "last ditch" fight in this case, but to deny to the appellate herein, her rights, even though they may be now satisfied that into whatever tribunal this case may come, it will be decided as this court did on the opinion attacked in the petition. In other words, they hope that by an inspection of the Federal question in this case, even though brought in too late; even though brought in at the time that the rules of this court will not allow a consideration, that this court may be induced to consider the question so that the basis may be made for a writ of error from the Supreme Court of the United States to this court, and the matters in litigation between these parties tied up for an indefinite period. A Federal question first set out and asserted in a petition for rehearing, after the judgment in the trial court had been affirmed by the highest court of the State, will not support the jurisdiction of the Federal Supreme Court on a writ of error where the petition was not entertained, but was denied without passing on the Federal questions thus tardily raised.

St. L. & S. F. R. R. Co. vs. Shepherd, 240 U. S. 240, 60 L. Ed. 622;

Waters Pierce Oil Co. vs. State of Texas, 212 U. S. 112.

The mere assertion in a State court, in a petition for rehearing of a right under the Federal Constitution, affords no ground for
214 invoking the appellate jurisdiction of the Federal Supreme Court unless the State Court in dealing with such petition considers and passes upon the Federal questions therein relied upon.

Boone vs. Scott, 233 U. S. 658—58 L. Ed. 1141.

Where, however, the Federal question is first raised by a petition for rehearing in the highest State Court, if the State Court passes upon the question, even though contrary to its rule, then the Federal question arises.

Ky. Union Co. vs. Kentucky, 219 U. S. 140—58 L. Ed. 137;

Ill. Cen. R. R. Co. vs. Kentucky, 218 U. S. 551, 54 L. Ed. 1147;

Sullivan vs. Texas, 207 U. S. 416—52 L. Ed. 274;

Grannis vs. Ordean, 234 U. S. 385—58 L. Ed. 1363.

It seems however, that the mere overruling of a petition, where the questions have been presented for the first time in the petition for rehearing, does not give jurisdiction to the Federal Court.

Consolidated Turnpike Co. vs. Norfolk & O. V. R. R. Co., 228 U. S. 326—57 L. Ed. 857;

McCorquodale vs. Texas, 211 U. S. 432—53 L. Ed. 269;

Forbes vs. State Council, 216 U. S. 396—54 L. Ed. 534.

With these remarks we submit the matter on our objections to the petition. We do not want to be understood as making any argument whatever upon the merits of the petition outside of the questions covered by our objections, but we are satisfied with the majority opinion in the case and believe the same to be unassailable, and think that it furnishes a complete answer to everything that is urged by the appellants in the petition for rehearing, outside the matters which we believe cannot be, and should not be, considered in the matter, and therefore we ask that the petition be denied.

Respectfully submitted,

Parsons & Mills, Attorneys for the Appellee.

217 & 218 APPELLANTS' SECOND PETITION FOR REHEARING

[Filed February 17th, 1921, by and in the Office of B. W. Garrett, Clerk of the Supreme Court of Iowa]

(Portions Stipulated as Being Deemed Material)

219 The original majority opinion in this cause was filed December 16, 1919, and reported in 174 N. W. Reporter at page 946, with dissenting opinion beginning on page 953.

The so-called supplemental majority opinion was filed December 20, 1920, and is reported in 180 N. W. Reporter, page 206, with dissenting opinion beginning on page 208.

220 *Second Petition for Rehearing*

The appellants respectfully petition for a rehearing in this cause generally, and especially upon the matters and things laid down and decided in the Supplemental Opinion herein handed down as aforesaid December 20, 1920, and they base their petition upon the following, among other grounds, namely:

I.

Each and every of the grounds, propositions and conclusions set forth in the dissenting opinions by Salinger, J., beginning at the bottom of Column 2 on Page 208 of Volume 180 of the N. W. Reporter, as well as in Column 2 page 593 of Vol. 174 N. W. Reporter, are hereby adopted and made a part of this petition for rehearing as fully as if the same were set forth herein in detail.

222

VI.

There is a Federal question involved which should be considered by this Court.

It appears from the record and from the majority and dissenting opinions that in the last analysis the decision of the Court is grounded upon the proposition that in respect to personal property

a spouse cannot contract for a disposition thereof effective at the end of his or her life, without the written consent of the other spouse. This new rule, if applied at all, must be applied regardless of whether the attempted disposition by contract affects the whole or any fractional part of the personal estate involved.

(a) That this was not the law of the state of Iowa at the time Charles Fleming made his contracts and had his various transactions with his brothers, has been abundantly demonstrated on the authorities cited.

(b) The rule is well settled that judicial interpretation of statutes becomes a part of them.

(c) The decision and majority opinions in this case therefore, change the meaning and effect of our statutes governing and affecting marital rights in personal property: they effect legislation though emanating from a judicial source.

(d) It is a case then of change in legislation by changing the judicial interpretation of that legislation.

(e) The three written contracts in controversy and the assignment of the insurance policies and of the corporation stock pursuant to those written contracts were made by the four brothers in good faith and in reliance upon the former judicial interpretation of the statutes of Iowa governing marital rights in personal property.

(f) The new decision and new interpretation which, if carried out, deprives the surviving brothers of at least one-eighth of their property held under and by virtue of said contracts, is therefore an impairment of the obligation of their contracts and operates to deprive them of their property without due process at law. And this is in violation of Article 1, Section 1 of the Constitution of Iowa and of Section 10, Article 1 of the Constitution of the United States and of Section 1 of the 14th Amendment to the Constitution of the United States.

That this creates a Federal question of which the United States Supreme Court will take jurisdiction on writ of error, see

Muhlker vs. N. Y. & Harlem R. R. Co., 197 U. S. 544.

APPELLANTS' THIRD PETITION FOR REHEARING

[Filed Nov. 25, 1921. B. W. Garrett, Clerk Supreme Court of Iowa]

The original majority opinion in this cause was filed December 16, 1919, and reported in 174 N. W. Reporter at page 953, with dissenting opinion beginning on page 953.

A so-called supplemental majority opinion was filed December 20, 1920, and is reported in 180 N. W. Reporter, page 206, with dissenting opinion beginning on page 208.

A second rehearing was had and on opinion thereon was handed down September 28, 1921, reported in 184 N. W. Reporter, page 296, being found in Advance Sheet No. 7, of October 28, 1921, of the N. W. Reporter.

Third Petition for Rehearing

The appellants respectfully petition for a rehearing in this cause generally, and upon the matters and things laid down and decided in the supplemental opinion handed down herein December 20, 1920, and especially upon the matters and things laid down in the second supplemental opinion handed down September 28, 1921, reported as aforesaid in 184 N. W. Reporter, page 296; the appellants base their petition upon the following among other grounds, namely:

I.

Each and every of the grounds, propositions and conclusion set forth in the dissenting opinions by Salinger, J., beginning at the bottom of column 2 on page 208 of Volume 180 of the N. W. Reporter, as well as in column 2, page 593 of Volume 174 of the N. W. Reporter, are hereby adopted and made a part of this petition for rehearing as fully as if the same were set forth herein in detail.

228 & 229

II.

Every point, proposition and argument heretofore made to this court in this cause, contained in the appellants' original brief, appellants' reply, appellants' first petition for rehearing, and appellants' second petition for rehearing, are hereby urged and reiterated with the same force, confidence and effect as if set forth in detail herein, but the reprinting of the said matters in this petition for rehearing would unduly and improperly extend the record in this cause without facilitating the consideration thereof by this court, and therefore the appellants respectfully request and urge that all of the matters, authorities, arguments and things set forth in the documents above referred to and now on file in this court, be considered as a part of this third petition for rehearing with the same force and effect as if the same were set forth in detail herein.

230 In the Supreme Court of Iowa, December 10, 1918

Supreme Court No. 32408

[Title omitted.]

Appeal from Polk District Court

SUBMISSION OF CAUSE

This cause is submitted on abstracts and arguments on file and oral argument of counsel for both sides.

SR 31-111.

Ordered by the Court and entered of record on the 10th day of December, A. D. 1918.

A True Copy,

Attested:

B. W. Ganett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

In the Supreme Court of Iowa

JUDGMENT RECORD ENTRY OR 5-576

ANNA B. FLEMING

VS.

ROBERT J. FLEMING et al., Appellants.

Appeal from Polk District Court

In this cause, the Court being fully advised in the premises, file their written opinion Affirming the judgment of the District Court. It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellants pay the costs of this appeal, taxed at \$—, and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court, filed on the 16th day of December, 1919, in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 15th day of December A. D. 1922.

B. W. Ganett, Clerk Supreme Court. [Seal
of the Supreme Court of Iowa.]

OPINION.

(Supreme Court of Iowa, Dec. 16, 1919.)

(No. 32408.)

FLEMING

V.

FLEMING et al.

1. Joint Tenancy *1—Nature and Elements.—The essential elements of an estate in joint tenancy are that it be held by two or more jointly, with a clear right in all to share in the enjoyment of the estate during their lives, and the tenants must have one and the same interest accruing by one and the same conveyance, commencing at one and at the same time, and the property must be held by one and the same undivided possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint Tenancy.]

*For other cases see same topic and key-number and all key-numbered digests and indexes.

2. Joint Tenancy *1—Commercial Enterprise as Subject to Joint Tenancy.—There can be no joint tenancy in a commercial enterprise dealing with the property, or profits of an insurance business.
3. Partnership *17—Intent as Determining Element.—As between the parties, the true test as to whether or not they are associated as partners is the intention with which they have entered into the relation, a partnership in its true sense being formed for the purpose of trade or business, the profits realized from such business being the property of the persons associated, and in determining whether a partnership was intended, the whole situation at the time the agreement was made, and all surrounding circumstances, may be considered, as well as the subsequent admissions of the parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

- 234 4. Dower *17—Joint Tenancy *1—Partnership *3—Property Held by Husband Subject to Right of Dower.—Where four brothers entered into written agreements to devote their time to the insurance business as a common enterprise, each having the right to withdraw funds, as needed, without an accounting, such withdrawals to represent the entire interest of the member, and that upon the death of any member the property held by the association was to become that of the survivors the association held to be one of partnership, and not of joint tenancy, so that on the death of a partner, his share was subject to his widow's dower rights.

Salinger, J., dissenting.

Appeal from District Court, Polk County

Charles A. Dudley, Judge

Action by a widow to have her distributive share ascertained, determined, and set off in what she claims to be partnership property. The defense is that the property was owned in joint tenancy, and is therefore not subject to her claim to dower therein. Decree for the plaintiff in the court below. Defendants appeal. Affirmed.

William E. Miller and Albert B. Cummins, both of Des Moines, for appellants.

Parsons & Mills, of Des Moines, for appellee.

GAYNOR, J.: This action is in equity, brought by Anna B. Fleming, as the surviving widow of Charles Fleming, against his surviving brothers as individuals, who, named in the order of seniority, are Robert J., John A., and Stanhope Fleming; and against Fleming

*For other cases see same topic and key-number and all key-numbered digests and indexes.

Bros., an alleged partnership, composed of deceased and the three brothers above named; and against John A. Fleming as administrator of the estate of Charles Fleming.

The plaintiff's claim is that her husband, Charles, died seized and possessed of an interest in certain property now in the possession and held by these defendants; that they refuse to recognize her right to a distributive share therein, and claim to own the same against the right asserted by her.

The original purpose of the action was to have, ascertain, and set aside to her, as the surviving widow of Charles, her distributive share in so much of the property as her husband died seized or possessed. She claims that he died seized and possessed of an interest in the property now in the hands of these defendants or some of them.

Here the issues are narrowed to the ascertainment of whether or not plaintiff's husband, Charles, died seized or possessed of any interest in the property held by these defendants or some of them. If it be determined that he had an interest in the property at the time he died, then she is entitled to a distributive share therein, and her claim must be recognized and enforced, but the amount of her interest is not the subject of investigation at this time for, by agreement of parties this is left for future consideration and determination by the *nisi prius* court. The determination of the question here involves only the proper construction of the three writings on which defendants rely to defeat her claim, to which specific reference will be made hereafter.

It appears that up to and at the time Charles died, Fleming Bros., including the deceased, Charles, owned quite a large estate, consisting of both real and personal property. The question to be determined is whether this property was owned by these four brothers as joint tenants, with a right of survivorship, or whether it was owned by them as partners. It is the claim of the defendants that all the property in controversy, prior to and at the time of Charles' death, was held by these four brothers as joint tenants, to which the right of survivorship attached; that upon the death of Charles, all his interest in the property ceased, and this by virtue of the terms of certain written instruments under which the business was conducted and the property acquired and held at the time Charles died.

Charles Fleming, the deceased, was married to the plaintiff on the 2d day of January, 1880, and died in Polk county, January 15, 1916.

The first instrument on which the defendants rely to cut off this widow from a right to share in the accumulation of all these years of her husband's faithful service and toilsome labor represented by the property in question was made on the 14th day of December, 1896, and at a time when but a small portion of the accumulated fortune, which is the subject of this litigation, had come into existence. It reads as follows:

Know all men by these presents that we, Robert J. Fleming, Charles Fleming, John A. Fleming, and Stanhope Fleming, of the city of Des Moines, state of Iowa, in order to provide for the

future uninterrupted prosecution of the business of life insurance in which we are now or may be hereafter engaged and mutually associated, and to fix and determine the interests of each therein, hereby mutually agree, and bind ourselves, our heirs, executors, administrators or survivors and all other persons, that, each of the parties to this stipulation and agreement, shall have only such share of, and interest in the profits, earnings and income of the business of life insurance in which we are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each, with the consent of the others, from the income of said business. And such amount so paid shall fully represent the share and interest of each of the parties hereto, at any time while we, the undersigned, shall be associated together in said business or thereafter. Upon

235 the death or withdrawal of any party hereto, all his interest in said business shall thereupon cease and determine and at no time shall any accounting be made or required to be made by any party hereto, his representatives, executors, heirs or survivors, or any other person claiming under him, or to any person, officer or representative, upon any basis of labor performed or money received on account of said business by any of the parties hereto or otherwise. And it is distinctly understood and agreed between the parties hereto that they, nor any of them have, or can have any property rights, or money interests in said business other than that herein specified and defined, and any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business.

No doubt, deeming that this instrument did not fully express the purpose and intent of the parties, and might not be construed to effectuate their purpose and intent, they made a second instrument on the 23d day of January, 1897, as follows:

Know all men by these presents that we, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming of the city of Des Moines, Iowa, in view of our past association in, and the manner of the conduct of our business without the usual and ordinary incidents of a partnership, and to more effectually define and determine our individual interests in said business in the future, as between ourselves, and in relation to all other persons, and to prove for the future uninterrupted prosecution of said business in which we are now engaged, or may be hereafter associated, hereby mutually agree and bind ourselves, our heirs, executors, administrators, survivors, and all other persons as follows: That in consideration of the services of each of us rendered, or hereafter to be rendered in the business of life insurance, of the income to be derived therefrom and of the mutual stipulations herein contained, each of the parties to this agreement has, and hereafter shall have, only such share of, and interest in the profits, earnings, renewals due or to become due under any and all contracts of insurance, or commissions thereon, to whomsoever nominally payable in the business of life insurance in which we are now or any of us shall hereafter be jointly engaged, as shall be actually received by each, or shall be paid upon the order of each with the

consent of the others, from the general funds or income of said business; and any sum or amount so paid shall fully represent the share and interest of each of the parties hereto at any time while any of the undersigned shall be associated together in said business or thereafter. It is further agreed that upon the death or withdrawal of any party hereto, all his interest in said business, and in the assets thereof, shall thereupon cease and determine; and at no time shall any accounting be made, or required to any person, or any party hereto, or their heirs, executors, administrators, survivors or representatives. It is further stipulated and agreed that any and all contract rights, and all interest in renewals of policies of insurance in the Mutual Life Insurance Company of New York, due or to become due since January, 1893, all commissions earned or hereafter to be earned, and all bonuses, allowed payable or to become payable in any manner, whether payable to or standing in the name of Robert J. Fleming or any other of the parties to this agreement, are hereby assigned and transferred to, for the mutual benefit of the parties hereto, to be used, applied and disposed of in the manner only as herein agreed and provided for. It being the intention of all the parties to this agreement, and they hereby declare that they, nor any of them have, or can have any property rights or money interest in said business other than that herein specified and defined, so long as any of them shall be associated together in the business of life insurance.

Under these two instruments, they continued their labors and prosecution of the business in which they were engaged and mutually associated, and further property was accumulated through the joint efforts, and a large estate created. However, on the 7th day of January, 1911, feeling that they had not yet fully expressed in writing their relationship to each other and to the estate that had been and was being accumulated, they made a third writing as follows:

"Whereas, the undersigned, Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming are engaged in the life insurance business in the states of Iowa, Nebraska and Wyoming under a contract with the Massachusetts Mutual Life Insurance Company: and,

"Whereas, each of the undersigned is the owner of one-fourth of the stock of a corporation organized under the laws of the state of Iowa known as Fleming Bros., Incorporated; and

"Whereas, the undersigned also are the owners of certain real estate and other property in which each of them is interested; and,

"Whereas, the undersigned expect to acquire additional property hereafter; and,

"Whereas, the said property now held and owned by the undersigned has been acquired by them with the understanding that it shall be disposed of as hereinafter set out:

"Now, therefore, in consideration of the premises and one dollar in hand paid by each of the undersigned to each of the others whose names are signed hereto;

"This agreement made and entered into by and between the said Robert J. Fleming, Charles Fleming, John A. Fleming and Stanhope Fleming on the 17th day of January, A. D. 1911, will witness:

"1st. That the partnership between the undersigned is with the express and distinct understanding and agreement that all of the property heretofore acquired by the undersigned has been acquired as the results of the said partnership, and that said property now belongs to the said partnership, including all proceeds of said insurance business with the renewals to which the parties hereto may be entitled thereon.

"2d. That upon the death of either one of the undersigned, the property then owned by the said partnership, including all
236 property standing in the names of the individual partners which embraces said stock in Fleming Bros., Incorporated, shall be and become the property of the surviving brothers of the said partnership, and that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein.

"The premiums upon all insurance carried by the undersigned, whether life or accident (except policy No. 741051 in the Mutual Life Insurance Company of New York, upon the life of Robert J. Fleming, payable to Emma D. Fleming, his wife, which policy is not a part of said partnership property), have been paid by the said partnership, and the said partnership is entitled to the proceeds of all such insurance except the policy above referred to payable to Emma D. Fleming.

"3d. This contract covers not only the property now owned, but also property hereafter acquired, and all hereafter acquired property, including the proceeds of life insurance, whether standing in the name of the said individuals, or either of them, or in the firm name, is understood to be firm property, unless there be an express agreement to the contrary.

"Executed in quadruplicate."

In this third instrument the parties to the first two instruments have undertaken to define the relationship existing between them, and to more clearly state the relationship they sustained to the property, and to define more clearly what they meant when they said in the first two contracts, to wit, "In order to provide for the future uninterrupted prosecution of the business of life insurance, in which we are now or may be hereafter engaged and mutually associated." This last instrument is the last expression of these parties touching the subject-matter of all three contracts, and they themselves have therein stated, in words that have definite and legal signification, what they understood the relationship was under which they were operating.

We look to what is written in these three instruments, taken as one instrument, to find the thought that lies back of the writing, the purpose and intent of the parties in the making of the writing, and to find the legal status that the writings create. That these parties had a purpose and an intent to accomplish something touching their

rights, duties, and obligations to each other in the making of the instruments and a purpose to fix the rights of each in the property accumulated and to be accumulated, must be assumed. Within these instruments the height, depth, width, and length of that purpose must be found. The thought of the brothers could not have been that the title to the property acquired as it came into existence should vest in no one, except the portion taken and appropriated by each to his immediate needs. The title to property that can be the subject of ownership, we must assume, vests in some one, whether it be an individual, individuals, or a legal entity. This property, when it came into existence, vested in these brothers. They became vested with the title as joint tenants, or they became vested with the title as tenants in common, or they became vested with the title as a copartnership. The character of the title held by these defendants is the subject of our investigation, and controls the rights of this plaintiff. Within the cover of these writings must be found all that these men had in mind touching their personal relationship and their relationship to, and interest in, the property accumulated by the joint efforts. As the third writing is the last expression of the minds of all these parties touching their relationship to each other and to the property, it might well be considered the controlling expression, determinative of their relationship and their rights in and to the property at the time Charles died. The property in question came into existence only by the joint efforts of these men, working hand in hand, shoulder to shoulder, in a common enterprise, with a common purpose. That purpose was the accumulation of property, the building up of a fortune. During the years that have passed by, each has labored faithfully, and through his labor, joined with the labor of his brothers, the subject-matter of this controversy has been created. What they have said in these contracts and what they have done in execution of the purpose therein expressed, is the only expression of the thought and purpose to which our minds are directed. These writings, considered together, show the mutual understanding and purpose of the parties.

We need not here enter into any discussion of the origin and purpose of a joint tenancy. Its origin and character was feudal. It was of English origin, and highly favored, at first, for reasons that were feudal. But whatever causes may have led to the origin of such an estate, or that commended it to the minds of the great jurists of that time, it unquestionably has grown into much disfavor in this country and in England. Some states have denied the existence of it in any except real property. See *Hart v. Hart*, 201 Mich. 207, 167 N. W. 337. Some have abolished it altogether, and some require strict proof. It has been condemned because it imperils the future of those whom the law assumes to guard and protect. Under our law, the wife, the weaker vessel, the one who maintains the home and rears the children, is entitled to have provision made for her, if, peradventure, death robs her of the one legally and morally pledged to support and maintain her. She is entitled to share in such of his estate as by his efforts he accumulates and leaves at his death. The husband cannot take this from her by any testamentary

237 disposition. He cannot contract with her for its release. In view of the legal status of the wife, in view of the relationship which she sustains to her husband, in view of those provisions of statute that protect and guard her interest during his life and after he is dead, it would seem to be against the policy of the law, expressed in the statutes, to permit men to legally get together and agree with each other that, upon their death, their wives and children shall receive no portion of the estate which they spent their lives in accumulating. It is a clear fraud on the marital rights of the wife. Many a wife has been a faithful helper in the building of great fortunes. Many a wife, by economy and self-denial, has been a strong factor in the building. Yet we are asked to say that this wife, who has done faithful service and practiced self-denial for 36 years that something might be left for declining years, must be left penniless. These are some of the features that bring this kind of tenancy into disfavor and show that it cannot be made to defeat a wife's claim under the statute.

[1] The essential elements of an estate in joint tenancy are that it be held by two or more jointly, with a clear right in all to share in the enjoyment of the thing during their lives. There are four requisites: The tenants must have one and the same interest. The interest must accrue by one and the same conveyance, except as modified by the statute of uses. They must commence at one and the same time, and the property must be held by one and the same undivided possession. If such an estate be recognized and the rights of parties to create it with all its unnatural consequences, the consequences that legally flow from it must be permitted to flow, no matter what this court may think of the justice or injustice of it, and though it leave this wife to the cold charity of an unsympathetic world. In none of the writings did these brothers bind themselves to make any provision for her. If she receive aught from them, it comes to her, not as a matter of right, but as a matter of grace.

It is true that under the common law, an estate may be created and held in joint tenancy. The estate is joined in the number of persons interested. No matter what the number of parties interested may be, the tenants are regarded as one individual. The right that each has in the joint estate continues during his life, and terminates with his death. The survivors, still considered as one person, hold the estate by right of survivorship. The last survivor takes the whole estate, and then it becomes, for the first time, an estate of inheritance, and passes to his heirs or legal representatives. While the tenants are considered as one person, and the estate joint, yet each of the tenants has a moiety interest. Or, in other words, while each joint tenant is regarded as having the whole of the estate, his interest in the estate may be put to an end or severed during his life. Each joint tenant, during his life, may dispose of his share by the usual modes of conveyance, but if he die without making such disposition, the title to the thing, which is the subject of the joint tenancy, remains in the survivor or survivors, free from the share or moiety of the one who dies. At common law, the sale by a joint tenant of his share during his life was regarded as a cutting off of that share from

the joint tenancy, and that share then was discharged from the incidents of joint tenancy, and passed to the grantee to be held as a tenancy in common. But unless some disposition is made by one of the joint tenants of his interest, and the estate is permitted to remain as a joint tenancy until death, it remains by the right of survivorship in the other tenants. So as between ourselves, each tenant has a distinct right, but the right of each tenant is equal in every respect. So it is said that a joint tenancy is distinguished by unity of possession, unity of interest, and unity of title. It was the purpose of the feudal system to keep the title in one person, but this seems to have been touching lands only. It, however, in modern times has been recognized as a right in personal property as well, but never so recognized in this state, or generally, as applying to commercial enterprises.

[2] Considering the foundation upon which the doctrine of joint tenancy rests, it is the opinion of this court that it does not apply to commercial enterprises of this kind, and that no joint tenancy can arise out of a commercial enterprise such as we have here before us in this case. It is inconsistent with the very foundation principle upon which joint tenancy exists or can exist.

Analyzing these writings, we find that at the time the first instrument was made the parties had in mind that they were associated together, in some way, not expressed in this writing, and engaged in a business from which mutual profit would arise, and out of which property of value would come; that each had, so long as he lived, a right to use a portion of the income and profits of the business in which they were so mutually associated; that, whenever his needs required, and to that extent only, he had a right to take from the earnings and income of the business such sum as he needed, upon the order or with the consent of the others. This provision was intended to cover the immediate needs of each of the parties so associated and engaged in the business. Its purpose evidently was to forestall any extravagant tendencies on the part of any of the brothers, and to conserve the interests and profits of the business to the end that the business might not suffer from extravagance and be continued uninterrupted. To say that when one of these parties took from the

profits of the concern any sum of money, however small, to
 238 meet his immediate needs, the same, when taken, measured
 his interest in all the accumulations of the past years could
 not have been intended to be literally construed.

If the parties were, in fact and law, joint tenants, then each had a right to enjoy the income of the estate, and the fact that one of the tenants appropriated a portion of the income to his own use could not have the effect of destroying his interest in the subject-matter of the tenancy. The idea of joint tenancy is that each tenant has a right to an equal enjoyment of the thing which is the subject-matter of the tenancy. If the receiving of any portion of the income or the profits of the estate had the effect of destroying the interest of each in the subject-matter of the tenancy, then, upon the appropriation of any of the profits by the tenants, or any of them, the joint tenancy would cease. The provision of the contract above referred to

must have been intended as limiting the right to enjoy the income and profits of the business, and not to take his right in the subject-matter of the tenancy. His right to take was measured by his needs. What he took was a declaration, by the taking, of his then needs, and measured his right, at that time, to take to his personal use the income and profits. It does not mean that it measured or could measure his interest in the property accumulated by the joint efforts of the parties, or that the sum of money received determined his interest in the property.

The second contract, though changed in wording, expresses practically the same thought, with the added purpose to transfer to the entity, whatever it is, all rights of Robert J., under his contract with the Mutual Life Insurance Company of New York.

It will be noted that in the first two writings no direct provision is made for the vesting of the title to accumulated property in any designated entity or person. It is now assumed by these defendants that it vested in the brothers as joint tenants. No estate in the tangible property that accumulated as a result of the business enterprise is by express provision vested in any person, persons, or entity. We turn therefore to the third writing for further light as to the purpose and intent of these parties, and the status created by the preceding writings.

It appears that between the time of the making of the second contract and this third contract, Fleming Bros. had incorporated, or a corporation was created known as Fleming Bros., Incorporated. This corporation issued to each of the brothers stock in equal parts, we take it, and each undertook to assign his stock by writing his name on the back thereof, without naming the assignee, and deposited it in a receptacle which it is claimed was under the control of all four of the brothers. This third contract makes plain what is wanting in the other contracts, and says that they were associated together as a partnership, and that the partnership is with the express and distinct understanding and agreement that all the property heretofore acquired by the undersigned had been acquired as the result of said partnership, and that said property now belongs to said partnership. Reading the previous writings in the light of the revelations made in the third writing, it is not as difficult to understand and to give legal force and efficacy to what is therein said. We take it that these four brothers organized a partnership with the understanding that the business carried on by the partnership should remain intact, and that the future of the business should be uninterrupted in its prosecution; that the title to the earnings and income of the business, the accumulated assets, should vest in the partnership; that each party should have a right to take, with the consent of the others, so much of the earnings of the partnership as his needs demanded, be this great or small; that he should never afterwards be called on to account to the partnership therefor. Their labors were all in the interest of the partnership. The only source from which a livelihood could come was through the earnings and income of the partnership for which they labored. They evidently had confidence in each other; confidence that each would labor to his fullest extent in the

interest of a common enterprise, and that each would be frugal, and take no more from the earnings and profits of the partnership than was necessary to meet his personal needs, and so the restriction was made as it appears in the first and second contracts, in fact, in all the contracts. Each, having confidence in the integrity of the other, agreed that no accounting should be had of their labor. That is, they would assume that the labor of each equaled the labor of the other in the interests of the partnership. The desire was to keep the partnership a going concern, and that there should be no interruption in the prosecution of the business; that no one should be permitted to draw from the company, for his personal use or otherwise, any sum of money that might tend to cripple the partnership in the prosecution of the business for which it was created. After they had organized the corporation, an aliquot part of the corporate stock was issued to each of the brothers. Each brother undertook to assign the stock issued to him. The assignment was made in blank, but we find was intended to be assigned to Fleming Bros., a partnership, though it was not named as assignee.

It is further said in the third writing that it is made with the understanding that all the profits heretofore acquired by said partnership have been acquired as the result of said partnership, and that said property now belongs to said partnership, including all property of said insurance business, with the renewals to which the parties hereto may be entitled thereon. And we have them saying in this third writing:

"We are engaged as partners, in the life insurance business, mutually associated together as partners, and as such we desire to provide for the future uninterrupted of the business in which the partnership is engaged."

But it is said that the fact that they called themselves partners, or that they were there engaged in a common enterprise or business, is not controlling; that there is nothing in a name; that the relationship must be determined from the entire writing; that the writing does not disclose all elements that are essential to constitute a partnership; that a partnership is a contract, and the contract determines the relationship of the parties to each other, and whether a partnership exists; that the mere fact that they, in this third writing, say many times that they are partners, that a partnership exists, that the property is held by a partnership, does not determine their relationship to the property, or their interest in the property, or the character of the association by which their interests are united.

A slight history of the origin of partnership will not be out of place at this time. Originally, it was founded on confidence, independent of any contractual relationship. Because of the fact that in the early days families followed one occupation, these partnerships usually were found to exist among relatives. Though founded in confidence in the early days, in modern times it was recognized as a contractual relationship. It grew out of the necessities of trade, but confidential relationship was retained in the modern law. At the time the law

courts first gave cognizance to what is known as partnership relationship, they were familiar with tenancies in common and joint tenancies. However, under joint and common tenancies, the co-owners sustained no confidential relationships to each other. At least, not such as is found in modern partnership, and the right of agency did not exist among the joint co-owners. After passing through many stages of formation, the law came to regard partnership as an entity, something separate and distinct from the individuals, and, in some respects, much the same as a corporation is separate and distinct from its stockholders. At common law a partnership was nothing more than an association of individuals. A firm was recognized as a short form of expression to designate partners collectively. The early decisions touching partnership depend a great deal on the viewpoint of the particular judge, whether he had a mercantile conception or a common-law conception of a partnership, so the courts have sometimes reached different conclusions, although the facts upon which they based their conclusion were substantially the same. Originally, there were different theories of partnership. One that it was a separate entity like a corporation; the other, that it was a mere association of natural persons. Some consider it a status something like marriage. We find, however, Chancellor Kent defining it thus, 3 Kent's Commentaries, p. 23:

"A contract of two or more persons to place their money, effects, labor and skill, or some, or all of them, in lawful commerce or business, and to divide the profits and bear the losses in certain proportions."

Other writers define it as a combination of two or more persons of capital or labor or skill for the purpose of business for their common benefit. Gilmore on Partnership, on pages 1 to 6, defines it thus:

"Partnership is a relation existing, by virtue of a contract, express or implied, between persons carrying on a business owned in common, with a view of profit to be shared by them."

It is defined in the English Partnership Act of 1890, 53 and 54 Vict. c. 39, par. 1, "as the relation which subsists between persons carrying on a business in common with a view of profit."

Partnership implies that there is more than one person interested in it, and there is implied a mutual consent to the association, but that is not controlling, since there may be organizations, by mutual consent, which are not partnerships, such as churches. A partnership, in its true sense, is formed for the purpose of trade or business, and the profits realized from the business must be the property of the persons associated, if they are to be treated as partners. *Bottler's Ass'n v. Fennerty*, 81 Mo. App. 525; *Burt v. Lathrop*, 52 Mich. 106, 17 N. W. 716.

[3] As between the parties, the true test as to whether or not they are associated as partners is the intention with which they have entered into the relation. It is the legal intent or manifest intent of the parties that determine whether a partnership exists. In deter-

mining whether the parties to a contract intended to become partners, the court will take into consideration the whole situation existing at the time the agreement was made, and all the circumstances surrounding the transaction, as well as the subsequent admissions of the parties. That it is not denominated a partnership in the contract is not fatal. Where the agreement contains all the elements necessary to create a partnership, then the intention of the parties is clear, and none of the tests which are applied to determine whether a partnership exists are needed. But where the contract contains only part of the elements of a true partnership, and it becomes important to ascertain the intent of the parties, legal tests may be applied. It follows that where persons enter into an agreement to engage in a joint enterprise, and agree to share the profits, a presumption arises that they intend to be partners as between themselves. It is only made stronger by proof of an express agreement to share profits and losses. Where there is an agreement to engage in a business for the common good of all, and each agrees to devote his entire time to the business, and each is to share in the profits of the business, it is necessarily implied that each must share in the losses of the business, and especially may it be implied when, as in this case, each of the parties has agreed to put all his property, all his labor, all his time, and all his energies into the business. It may then be assumed that he subjects by so doing and agrees to subject himself, to all the losses which flow from the enterprise, for he has staked his all upon the cast, and he must stand the hazard of the die. So it follows that, though we find in this contract no express agreement to share losses, the wording of the contract and the character of the business is such that it is inevitable that each must have intended to share the losses.

[4] It must be borne in mind that the right of survivorship is only an incident to joint tenancy. It follows as a legal consequence from the creation of the joint tenancy. The joint tenancy, when created, vests in each of the tenants a common right in the property which does not survive his death, unless he becomes the last survivor of all the tenants. Then, for the first time, does that which before consisted in a practical sense, of a life estate in the property, become vested as an estate of inheritance. In a legal sense, his death does not transfer the rights that he possessed in the property to the surviving tenants. Death does not enlarge or change the estate. Death terminates his interest in the estate. It is rather a falling away of the tenant from the estate than the passing of the estate to others. It remains with the surviving tenants jointly, while in a partnership the partner is vested with an estate that survives his death. He has always an inheritable estate so long as he lives, and on his death that interest passes to his legal representatives. So that in a partnership, when one partner dies, his legal representatives become vested with whatever interest he had in the partnership, and his wife to her distributive share. He dies then possessed of an estate that passes to his legal representatives. His wife's share cannot be affected by any testamentary disposition made by the husband. It can be affected by no disposition made by the hus-

band which must take effect after his death, and not effectual during his lifetime. So it follows that in this property the deceased had an inheritable interest. On his death it passed to his legal representatives, and his wife became vested with her distributive share, which must be recognized and enforced.

We find, therefore, that a partnership existed between these parties. The provision, therefore, in the contract, that upon the death of any member his interest in the partnership property should pass to his brother partners is an attempt to make a testamentary disposition of the interest of each partner. A fair consideration of all these instruments shows that they were not understood as creating a joint tenancy. It fairly shows that all the brothers understood that they were associated together as partners, and that a partnership existed. An attempt to create survivorship among partners is an attempt to make a testamentary disposition of the dying partner's property or his interest in the partnership property, in favor of the surviving partners, to take effect after his death.

We are satisfied with the decree of the district court, and its judgment is affirmed.

Affirmed.

Ladd, C. J., and Weaver, Evans, Preston, and Stevens, JJ., concur.

DISSENTING OPINION

SALINGER, *J.* (dissenting): I. The majority opinion is fine literature. It discloses much research and learning. It is clear in the statement of thought units. On first reading, while reading, one finds nothing to differ from. Having finished, there seems to be nothing objectionable that is outstanding. Somewhat later, one finds a qualm of unrest suggested, such as sometimes follows too enjoyable a banquet. The reader can readily recall many fine passages and sound statements of law. But it now occurs to him that he cannot so readily understand why the opinion affirms. On another reading, made for the purpose of getting clear on this point, he does find some grounds for affirmance stated. Part of them are buried in the argument, and all the grounds are few in number. Every reason set forth as a ground for affirmance is contrary to well-settled law, and to both older and recent decisions in this court. In some of these opposing decisions the writer of the majority opinion and some of those who now join them spoke for the court. The opinion makes no reference to any of these. In a word, the final conclusion would seem to be reached because every argument urged in its support is untenable.

Reference has been had to grounds buried in argument. Some confusion exists as to what is argument and what is relied upon as a ground for the final conclusion reached. In this class are attempts to construe the three writings into which the parties entered. This construction deals with the purpose and object of the writings, the relation of each of the writings to each of the others, and to all three, and it singles out one part of the writings and construes it to mean

what it most clearly does not say. I may as well say at this point as say it anywhere that, in my opinion, this case presents no writings to be construed; that the writings themselves are so clear that no judicial construction is warranted; that here there is no question as to what was done and intended; and that the sole question is what is the effect of that which has been written. To what that effect is I shall, of course, recur later.

The majority declares:

"The determination of the question before us involves no more than the proper construction of the three writings on which the defendants rely to defeat the claims of the plaintiff;" that "within the cover of the three writings must be found all that these men had in mind touching their personal relationship and their interest in the property accumulated by their joint efforts."

It declares that we must look to "what is written in the three instruments taken as one instrument to find the thought that lies back of the writing, the purpose and intent of the party making the writing." It is said that "within these three instruments the height, depth, width, and length of their purpose must be found," and that to the three writings construed as one one we must look to determine status created by the writings, and whether the three create a joint tenancy. There is more along the same line, but this must suffice to point out that it is recognized for the time being that the question before us must be resolved by treating the three writings together as expressing what there is to decide. With this much I am in full accord. I do not find it so easy, however, to be in accord also with other parts of the opinion, wherein it is declared that "we must turn to the third for further light as to the purpose and intent and status created by the two preceding writings," that this is so far one thing because the last writing "is the last expression as to the subject of all three contracts," and that "it might well be considered the controlling expression, determinative of the relationship and the rights of the parties in the property, because it is the last expression." I pass, without further comment, the naked fact of the contradictoriness of these positions, and next address myself to a consideration of what is in truth the relative standing of the three writings.

It is true that some of the later writings express the idea that the makers deem them necessary to clarify earlier ones. But I venture to deny that either the first or second writing need any clarifying. I venture to assert that none of the writings did any clarifying; that no material change was worked by any writing in a former one; that the last is no more controlling than the first and that in this case there is the common case of doing much needless writing, and yet leaving all that is written too clear for the need of interpretation on part of a court. A short analysis of each of the three writings will, I think, demonstrate this—will demonstrate that in all vital particulars each of the three writings makes like provision and clear provision.

In the first, the object is stated to be "to write for the future uninterrupted prosecution of the business of life insurance in which we are now or may be hereafter engaged and mutually associated. The second declares it is made in view of the fact that the past association of the makers and the manner of conducting their business has been "without the usual and ordinary incidents of a partnership," and is made "to more effectually define and determine our individual interest in said business in the future as between ourselves and in relation to all other persons, and to provide for the future uninterrupted prosecution of said business in which we are now engaged or may be hereafter associated. " The only change, if it can be said to be one, which is made on this point by the third writing is that it has a more specific reference to an existing partnership than have any of the others. It recites "that the partnership between the undersigned is with the express and distinct understanding and agreement that all of the property heretofore acquired by the undersigned has been acquired as the result of said partnership, and that said property now belongs to the said partnership, including all profits of said insurance business, with the renewals to which the parties hereto may be entitled thereon." And it recites that each signer owns one-fourth of the stock in the corporation known as Fleming Bros., Incorporated. One part of the second writing makes specific reference to certain things that the parties shall own, by assigning and transferring "for the mutual benefit of the parties hereto" certain renewal commissions and "all commissions earned or hereafter to be earned, and all bonuses allowed, payable or to become payable in any manner, whether payable to or standing in the name of Robert J. Fleming, or any of the other parties to this agreement, * * * to be used, applied and disposed of in the manner only as herein agreed and provided for."

The third contract makes the first reference to the following fact:

"Said property now held and owned by the undersigned has been acquired by them with the understanding that it shall be disposed of as hereinafter set out," that said property includes certain real estate, and that it is purposed to acquire more by means of what will be realized from the joint business.

There are provisions which for convenience in further reference I will set out in a single-spaced group, denoting the writing in which the matter is found by a numeral in a bracket.

There is a declaration that the purpose is to fix and determine the interest of each and of all signers. [1]

It is distinctly understood and agreed by the parties hereto that they nor any of them have or can have any property rights
242 or money interests in said business other than that herein specified and defined. [1]

"In consideration of the services of each of us rendered or hereafter to be rendered in the business of life insurance, of the income to be derived therefrom, and of mutual stipulations herein con-

tained, each of the parties has and hereafter shall have only such share of their interest in the profits herein, renewals due or to become due under any and all contracts of insurance or commissions thereon to whomsoever nominally payable in the business of life insurance in which we are now or any of us shall be jointly engaged, as shall be actually received by each or shall be paid upon the order of each with the consent of the others from the general funds or income of said business." [2]

It is the intention of all the parties to this agreement and they declare that (neither) they nor any of them have or can have any property rights or money interest in said business other than that herein specified and defined so long as any of them shall be associated together in the business of life insurance. [2]

"And any sum or amount so paid shall fully represent the share and interest of each of the parties hereto at any time while any of the undersigned shall be associated together in said business or thereafter." [2]

What one who has deceased "has heretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein." [3]

It is further agreed that upon the death or withdrawal of any party hereto all his interest in said business and in the assets thereof shall thereupon cease and determine, and at no time shall any accounting be made or required as to any party hereto or their heirs, executors, administrators, survivors, or representatives. [2]

Upon the death or withdrawal of any party hereto all his interest in said business shall thereupon cease and determine (without right to accounting for the past). This is repeated. [1, 2]

The purpose is to bind survivors. [1] "Upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which includes said stock in Fleming Bros., Incorporated, shall be and become the property of the surviving members of the said partnership." [3]

It is manifest that as to vital points each of the three writings in effect repeats. It is manifest that the three, read together, are the contract, and a clear-cut one. What the contract is is perfectly stated in the decree appealed from, to wit:

"Considering the terms of the agreements, it is clear they were made with an intent to establish a joint ownership of the property acquired by the brothers with a right of survivorship upon the death of a brother in the surviving brothers or brother. Such intent and purpose appear in every contract. * * * The intent of the parties to the instrument set out above is clearly to create an estate with the incident of survivorship."

There is no just right to construe. And as to the one point where most of the construing is being done the construction is an erroneous one. I refer to the part which I have set out single-spaced. That is where it is said over and again, and by repetition in different ones

of the writings, that the share and interest of one who dies is what he has drawn out while he lived. It is the part which the majority holds was not intended to be "literally" construed. It is the part of an unmistakably clear contract which the majority amends by means of "construction." The judicial amendment is this:

"This provision was intended to cover the immediate matters of each of the parties so associated and engaged in the business. Its purpose evidently was to forestall any extravagant tendencies on the part of any of the brothers, and to conserve the interest and profits of the business to the end that it might not suffer from extravagance and be continued uninterruptedly."

I repeat the words written are too plain to permit construction. The parties took great pains to say, and said most clearly and repeatedly, that they did not intend what the majority declares they did intend. I beg to add that the "literal" construction is demanded, because it is the only construction which is in harmony with the entire purpose of the contract. I mean by this that if it was the purpose to cut off inheritable interest and to give the share of one who predeceased to the survivor, it must have been intended that the only interest of the one dying first should be what he had received in life. For, if his interest is more than that, he will die seised of property, and it will not go to his survivor, but to next of kin or devisees, or both. In defining the interest and share to be what was received in life, the parties but recognized that they had contracted to cut off inheritable interest and to create a survivorship. I venture to say that is what they did contract to accomplish. There is no warrant for saying that the part defining share and interest is not to be construed literally. There is better reason for saying that that part of the writings is needless. Once agreed that neither party shall have an inheritable interest, once agreed that when one dies all that remains belongs to the survivors, and, without more, it has been agreed that the interest of each is measured by what he receives before he dies. So when it is all said and done, we have a clear contract that whoever died first left nothing to inherit, nothing for dower or marital rights to attach to; that at his death the title became complete and perfect in his survivors, and so on, until the last survivor was reached. As said, the only question is whether this is a lawful and enforceable contract. There is no question about what the contract is.

II. It may be conceded, for the sake of argument, that joint tenancy does not apply to "commercial enterprises," and that
243 neither in this state nor generally has it been recognized that such tenancies can be created as to "a commercial enterprise."

But does that quite meet the situation. These parties attempted nothing as to their commercial enterprise. What they did do was to arrange concerning the moneys that might be realized from such enterprise. Such moneys are not a commercial enterprise, but are personal property. If the insurance business was closed out and abandoned, the contracts would still have for operation all they ever

had to operate upon. True, the inducement in the contract was the belief that the contract would tend to avoid interruption of the business. But the joint tenancy was in the property the business had or would get—the purpose that death of one, as it in the course of nature occurs once and again, should not disturb the business by means of the drawing out that must occur when there is no agreement to cut off inheritable interests and no survivorship contract. The joint tenancy was created to avoid all interruption by withdrawal of the earnings and property by deaths until the one death of the last survivor. I do not overlook that the majority goes a step beyond and holds that there can be no joint tenancy in property other than land. But in this I think it is clearly in error, and that no such rule prevails in this jurisdiction, or anywhere. In *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998, we enforce a contract creating survivorship, both as to lands and personal property. In *Stewart v. Todd*, 173 N. W. 619, we enforce a survivorship agreement to cut off inheritable interest as to lands and also against some \$18,000 worth of personal property.

III. The most definite ground assigned for the final conclusion is this: It is found that the relation between the parties was that of a partnership; next, that the provision creating survivorship as to the partnership property "is an attempt to make a testamentary disposition of the interest of each partner." Finally, that "an attempt to create a survivorship among partners is an attempt to make a testamentary disposition of the dying partner's property, or his interest in the partnership property, in favor of the surviving partner, to take effect after his death." As a ground for affirmance, this finding can have but one construction, to wit, that a partnership cannot enter into a contract of survivorship because it is a partnership, and, passing that, if a partnership does make such a contract, it amounts to an unenforceable testamentary gift.

I am of opinion that no partnership was created, notwithstanding that the writings at times refer to the relationship as being that. While I agree that there may be a partnership if there be either express or implied agreement to share losses, it is my view that these writings have no such agreement to share losses. But that aside, I submit that nothing in the law prevents the creating of a joint tenancy with its incident of survivorship on part of a partnership. So far as there is a rule on the subject, none are excluded from creating such a tenancy except "bodies politic or corporations." 23 Cyc. 484, point 3. And there is express authority, both here and elsewhere, that a partnership can do the thing, whatever its name, which cuts off inheritable interest and creates a survivorship. In *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, it is held that where an uncle and nephew entered into articles of partnership to practice medicine, a provision in the partnership agreement that "in the event of death of the senior member of the firm all his property, personal and otherwise, which he held in partnership at the time of his death, shall go to the junior partner," should be enforced. One point made in the case was that it was a testamentary disposition

without the formalities of a will, and therefore incapable of enforcement in equity. Of necessity, the decision aforesaid overruled this point, and held, moreover, that the ruling could not be affected because the disposition was made in a partnership agreement as to partnership property. This is in harmony with our decisions that there is no unenforceable contract where a disposition agreed upon to take effect after death is not executed as a will should be, if the agreement rests on consideration. Surely, no one will challenge that the disposition made in the writings in this case has a consideration to support it. It seems to me that in *Stewart v. Todd*, 173 N. W. 619, we have disposed of the entire point contrary to the present conclusion of the majority. In that case we sustained this contract: The parties "have agreed to start a general store under the firm name (consisting of the name of the wife) in which each party is to be an equal partner." The husband "is to transact and do all business, sign the firm name to any and all papers necessary and all the property accumulated, purchased and owned by either party to be in the firm name, both parties to use any money they need and at the death of either party the one living shall fulfill all contracts, pay all debts and have all property left or owned by either party or in the firm name." We sustain the claim of the husband to survivorship under this contract, and included therein the real estate and, as well, a large amount of personal property.

The position of the majority is met at every essential point by the late case of *Smith v. Douglas County*, 254 Fed. at page 247 et seq., 165 C. C. A. 532. The matter cannot be better stated than is done in *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116, wherein we say:

"Laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the courts refusing to give it effect according to its clear intent?"

244 It is said that the title to property subject to ownership must vest in some one, an individual, individuals, or a legal entity. To be sure, that is so; but what is it relevant to, especially when it is also said that this property, when it came into existence, vested in these brothers, and that they became vested in these either as joint tenants or by placing title in a copartnership? This involves a repetition of the idea that there is a difference as to a partnership.

IV. One of the matters as to which it is difficult to say whether it be merely argument used as some sort of inducement, or a reason for affirming the decree below, is that part of the majority opinion which asserts, rightly enough, that, as a general proposition, estates in joint tenancy have in modern times ceased to be a favorite of the courts. Though true, how is this material if such tenancies are still recognized in this jurisdiction, and if therein contracts to create them may be specifically enforced in equity. If that be the state of the law in this jurisdiction, what purpose is served by those statements in the opinion which direct attention to the origin and character of joint

tenancy; that in its origin it was feudal; that some states have denied the existence of it except as to real property; that some states have abolished it altogether; and that some require strict proof thereof.

It may be conceded that in early decisions, among which is *Hoffman v. Stigers*, 28 Iowa, 302, is one that something was said to the effect that the estate of joint tenancy is not favored by our law. But when we consider the statute on tenancies, and its construction in cases much later than the *Hoffman* case and like decisions, such language in the early cases can mean no more than that there is such disfavor of such estate as that the proof thereof must be clear. The statute itself compels that interpretation, for it provides that conveyances to two or more in their own right create a tenancy in common, "unless a contrary intent is expressed." This must mean merely that a tenancy in common is presumed, and that the presumption will not stand if a contrary intent is expressed. We have expressly held that under this statute the estate of joint tenancy is permitted to be created, and that the only disfavor it stands in is that its existence must be clearly proved. We so held in *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116. In that case we say further that the qualifying words, "unless a contrary intent is expressed," leave a place in the law of the state for a joint tenancy, "with its characteristic incident of survivorship, if the intent of the parties to the instrument to create it is clearly indicated by the language employed." Here the agreement overwhelmingly demonstrates that the creation of a joint tenancy was intended. In the *Logue* case we held that such a tenancy had been created although the deed, standing alone, might convey the fee, and though the instrument was not drawn "with technical nicety nor the exactness of a learned professional conveyancer"—and this, on language very far from expressing such intent as clearly as the writings before us. About as much as this can be rightly claimed, too, for *Baker v. Syfritt*, 147 Iowa, 49, 62, 125 N. W. 998.

Nomenclature is, of course, quite immaterial. We so held in *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116. For we there held that the thing created, whatever its right name, was a joint tenancy which cut off inheritable interest and created a survivorship. Will any one venture to affirm that the writing in the *Logue* case more clearly or even as clearly evinced an intent to cut off the inheritable interest and to create a survivorship. So finding in the *Logue* case rests largely upon deduction and inference—sound, but still but deduction and inference. In the case before us the trial court that defeated the defendants also declared that purpose to cut off inheritance and to create a survivorship is clear beyond all doubt. And there is absolutely no room for either deduction or inference. For the provision in both the second and in the alleged controlling third writing we find this:

"It being the intention of all the parties to this agreement and they hereby declare that they nor any of them have or can have any property rights or money interest in said business other than that herein specified and defined, so long as any of them shall be associated together in the business of life insurance." [2]

"All right and interest in renewals and bonuses, no matter in whose name," is to be transferred for the mutual benefit of the signers "to be used and applied and disposed of only" in "the manner only" agreed on in the writing. [2]

"It is further agreed that upon the death or withdrawal of any party hereto all his interest in said business and in the assets thereof shall thereupon cease and determine (without accounting for the past). [2]

"Upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces all stock in Fleming Bros., Incorporated, shall be and become the property of the surviving members of the said partnership.

"And that what said decedent has heretofore drawn from said partnership shall constitute his sole and entire interest of his estate therein." [3]

V. The majority says:

"We are satisfied with the holding of the district court, and its judgment is affirmed."

But the holding of that court was not based on imperfect testamentary gift, and that court did not hold that the contracts did not clearly express an intention to create an interest that could
245 not be inherited, and which was to go to the survivors. The decree below is bottomed wholly on the conception that the contract is violative of sound public policy. I do not find that the majority places the affirmance upon that ground. And it seems to me it should not have been put on that ground by the trial court. The legislature is the supreme guardian of public policy, and whatsoever it approves is sound public policy. The statutes of this state in plain terms permit just what these defendants did. This court has so construed them. What the Legislature authorizes to be done cannot be violative of if sound public policy.

VI. It is true that, in a sense, each of the signers transferred things that might otherwise have been held by him severally to all of the signers. But that such assignment is permissible and merely tends to accrete the fund concerning which survivorship is created is one of the distinctions between a tenancy in common and a joint tenancy. While as a fiction of law each joint tenant holds all the property at all times, and that, ordinarily, there can be no recovery because the joint tenant uses all the property or its usufruct (23 Cyc. 490, *b*, 491, *d*), on the other hand, one tenant may maintain assumpsit against the other to recover his share of the property or its proceeds. *Stone v. Aldrich*, 43 N. H. 52. It follows that the survivorship agreement is not affected by the assignment of anything which the joint tenant owns as an individual, and that when he conveys his individual property under contract that a survivorship shall be created, concerning it, no right of dower attaches. *Maybury v. Brien*, 15 Pet. 21, 10 L. Ed. 646. In such cases he dies seised of nothing, and the majority concedes that the supreme test here is whether the husband of the plaintiff died seised of any of the things in which the plaintiff now claims an interest. As to personal

property, the right of disposal is absolute. We emphasize that in every possible way. See *Langworthy v. Heeb*, 46 Iowa, 64; *McDaniel v. Large*, 55 Iowa, 312, 7 N. W. 632; *Mallory v. Russell*, 71 Iowa, 63, 32 N. W. 102, 60 Am. Rep. 776; *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 360, 60 Am. Rep. 799. We have held that the share of the widow in personal property cannot be enlarged by treating property parted with by the husband as an advancement to children as still part of the personal property of which the husband died seised. *Burgoon v. Whitney*, 121 Iowa, 76, 95 N. W. 229. The power to dispose of the personalty is absolute (*Lunning v. Lunning*, 168 N. W. 140), and it would seem not to matter with what intent the husband parts with such property (*Metler v. Metler*, 19 N. J. Eq. 457).

This has its bearing, too, on the question of public policy. The very fact that the statutes restrain the alienation of real property while permitting it absolutely as to personal property shows that disposition of the latter by such an agreement as the one at bar is not against public policy. This answers, too, what the opinion is moved to say upon the fact that the wife is the weaker vessel, who maintains the home and rears the children, and is entitled to have provision made for her by law. Both the best and the poorest wife is entitled to such provision. But even the best wife is entitled to no more than such provision as the Legislature has seen fit to make for her. Conceding everything to the quality of the plaintiff as a wife, that throws no light on whether this contract, signed by her husband, is or is not enforceable. See dissent in *Yunker v. Susong*, 173 Iowa, 689, 690, 696, 156 N. W. 24, and dissent of Mr. Justice Marshall in *Hall v. City*, 128 Wis. 132, 107 N. W. 31, 37.

VII. Speaking by way of summary:

(a) We held in the *Logue* case, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116, that it is unnecessary to give the arrangement a name; that nomenclature was immaterial. We said:

"Laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the court's refusing to give it effect according to its clear intent?" that that intent was the granting of a unity of title with right of survivorship, and that the grantor had a right to prefer such an arrangement to "a tenancy in common with the ordinary incidents to such an estate."

(b) In joint tenancy neither of the successive survivors receives anything by inheritance from the deceased cotenant, and his title is derived solely and directly through the deed which created the tenancy. And the one who dies first does not die seised of any inheritable interest. And the last survivor becomes "the sole and unqualified owner." *Wood v. Logue*, 167 Iowa, at 436, 442, 149 N. W. 613, Ann. Cas. 1917B, 116. And such a contract is sanctioned by Iowa law. It is the essential distinction between an estate in common and a joint tenancy. And in the absence of statute the survivors take the whole estate free from any charges on the property made by the deceased cotenant. 23 Cyc. 488, 489.

(c) Dower cannot attach to the estate of a joint tenant where, as

in this case, his estate remains joint until his death, and this because his estate is not an estate of inheritance. It follows that decedent neither possessed in his lifetime nor died seised of any estate to which a dower interest in plaintiff could attach or inhere. He merely departed from the estate at his death. Code, §3366; 14 Cyc. pp. 901, 902, 1891, 1895, 1896.

My understanding is that the majority approves this much. All it fails to do is to make the approval effective.

246 (d) A joint tenancy may be created "by any conveyance or act of purchase inter vivos which gives an estate to a plurality of persons, where there are no restrictive, exclusive or explanatory words." 23 Cyc. 483, b.

(e) It is not the law that joint tenancies can be created as to land only, nor that they cannot be created by a partnership as to partnership property, either personal or real. In *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, it is held that inheritable interest may be destroyed and a survivorship created in all property "personal and otherwise," held in partnership when the senior partner dies. And that is the holding of *Stewart v. Todd*, supra.

(f) It is not the law that a contract like the one at bar fails for being a testamentary gift, for, though not executed with the formalities of a will, it is saved because it rests on consideration. *Stewart v. Todd*.

(g) Speaking to the rule generally, I find a pronouncement in 23 Cyc. 483, a, that "a joint tenancy exists where a single estate in property, real or personal, is owned by two or more persons other than husband and wife under one instrument or act of the parties."

(h) There is no difficulty about construction here. The writings either clearly create a joint tenancy or they do not. The whole test whether they do create one is an inquiry as to whether four elements coexist, to wit:

(1) Unity of interest.

(2) Unity of title.

(3) Unity of time, except as modified by the statute against perpetuity.

(4) Unity of possession.

That is to say, each owner must have one and the same interest conveyed by the same act or instrument to vest at one and the same time, and each must have the entire possession of every item of property held in joint tenancy as well as the whole. 23 Cyc. 484, 485. It follows that as to estates held in joint tenancy no right of dower will attach. *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646; *Park on Dower*, 37; *Scribner on Dower*, 269; 4 Kent's Com. 37.

247 In the Supreme Court of Iowa, June 30, 1920

Supreme Court No. 32408

[Title omitted]

Appeal from Polk District Court

SUBMISSION OF CAUSE

This cause is submitted on Appellant's petition for rehearing and resistance on file and oral argument of counsel for the petitioner.
SR 31-270.

Ordered by the Court and entered of record on the 30th day of June, A. D. 1920.

A True Copy.

Attested:

B. W. Garrett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

248 & 249

In the Supreme Court of Iowa

ANNA B. FLEMING

vs.

ROBERT J. FLEMING et al., Appellants

Appeal from Polk District Court

JUDGMENT RECORD ENTRY ON REHEARING

In this cause, the Court being fully advised in the premises, file their written supplemental opinion sustaining their former opinion filed herein, Affirming the judgment of the District Court, and overruling appellant's petition for rehearing.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellants pay the costs of this appeal, taxed at \$—, and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court, filed on the 20th day of December, 1920, in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 15th day of December A. D. 1922.

B. W. Garrett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

250 (Supreme Court of Iowa, Dec. 20, 1920)

(No. 32408)

FLEMING

v.

FLEMING

OPINION ON REHEARING

1. Wills *58 (1)—Contract between brothers who incorporated insurance business equivalent to contract to make will.

Where four brothers agreed to devote their time to an insurance business as a common enterprise, which was incorporated, each receiving his pro rata number of shares of stock, which they indorsed and placed in the safe together, the interest remaining to each was an estate descendible as such under the statute, subject only to the incumbrance created by their contract that on the death of any member the property held by the associates was to become that of the survivors, which contract was analogous and equivalent to a contract to make a will, and not effective to pass a present estate in any particular property..

2. Wills *11—Contract between associates that survivors should take ineffective as against widow of one.

Contract between four brothers who incorporated insurance business, equivalent to contract to make will, that on the death of any member the property held by the associates was to become that of the survivors, held ineffective, under Code, § 3376, as against the widow of one of the brothers, deceased; he not having sold his interest during his lifetime nor transferred it gratuitously.

3. Wills *59—Agreement of associates for survivorship supported by consideration of mutual promises.

Mutual promises of brothers, who incorporated insurance business, that on the death of any member the property held by the associates should become that of the survivors, held sufficient consideration to support such contract as between the parties to it, though there was a partial failure of consideration through the contract being unenforceable as against the widow of one of them, deceased, entitled to her statutory rights in the estate.

Salinger, J., dissenting.

*For other cases see same topic and key number in all key-numbered digests and indexes.

Appeal from District Court, Polk County

C. A. Dudley, Judge

On Petition for Rehearing. Petition Overruled

For former opinion, see 174 N. W. 946.

EVANS, J.: The justices concurring in the majority opinion heretofore filed are still satisfied that the case was properly decided. Because of some features of the argument in support of the petition for rehearing, we are disposed to add to the former opinion this further word of discussion:

The facts are sufficiently stated in the original opinion, and we shall not repeat them here.

We adhere to the view that the theory of joint tenancy in a common-law sense is not available to carry the appellants any further than the terms of their contract carry them.

If this contract by its own terms was effective to divest each of the contracting parties of his estate and to transfer the same to the survivor of them, then it were needless to say that a joint tenancy was or was not created.

If, on the other hand, the contract by its own terms was not effective to that end, then it was not effective to create a joint tenancy in the common-law sense. If the contract had purported in

251 terms to create a common-law joint tenancy, a somewhat different argument would obtain at this point. It did not do so.

On the contrary, is purported in terms to create a partnership. In determining the effect of the contract, therefore, we cannot add to its terms the legal fiction involved in a common-law joint tenancy. To do so would be to assume a joint tenancy as a major premise in order to prove it as a conclusion.

To put it in another way, the typical case of joint tenancy is ordinarily created by grant of a third party. It involves no necessary contractual relation between the joint tenants. In this case the alleged joint tenancy was not created by act of any third party. It was created, if at all, solely by the contract of the alleged joint tenants. Assuming for the purpose of this discussion that a joint tenancy may be thus created, it would be nevertheless a status created by the "contract" of the parties and not otherwise. Whatever the rights thus created, they must be determined in obedience to the contract and to nothing else. In the last analysis therefore we have before us a "contract"; nothing more, nothing less. Being a contract, it may be enforced as such unless there be some legal impediment thereto.

[1] Looking at this contract, what is its general nature or classification? Is it testamentary? Is it the equivalent of a contract to make a will? Is it a sale contract? Does it transfer property from one party to another? Does it obliterate the beneficial right and equitable title of any or all of the parties, to the property which is

the subject-matter thereof, and which in the absence of contract would be owned in common by all? Notwithstanding the contract, did the parties thereto still remain the beneficial owners of the property involved? Manifestly no party to the contract could thereby be divested of his beneficial interest in the property except by the transfer of the same to some other party. By a series of instruments the four parties conveyed their legal title to a corporation organized by themselves as exclusive stockholders. Each received his pro rata number of shares of stock. Thereupon each purported to transfer his shares by indorsement and delivery. To whom did he indorse and to whom did he deliver? There was no transferee and no taker of delivery. They all put their shares into a common receptacle and locked them in the safe to await eventualities. The property still remained in the dominion of the same parties. Its benefits still accrued to them. No fifth party had acquired any interest in or incumbrance thereon. The property rights of the four parties respectively, whether legal or equitable, were mutual and exactly equal. If they had then attempted a partition as between themselves, each must have received his one-fourth thereof. In some respects the contract on its face attempted the impossible. It attempted to dispose of the respective interests of the partners and yet to retain the same; to do and yet not to do; to give and yet to withhold. In the nature of the case such contradictions are not enforceable. The net result is that the equitable and beneficial ownership of the joint property, thus manipulated, remained, and that the equitable or beneficial interest thus remaining to each party to the contract was an "estate" within the meaning of the law and was descendable as such in accord with the statute, subject only to the incumbrance created by the contract itself. The contract in question was therefore analogous to and fairly equivalent to a contract to make a will, and only in that character can it be given effect. It was not effective to pass a present estate in any particular property. Nor did it operate as an incumbrance upon particular property during the lifetime of decedent, whether owned jointly or in severalty. Its obligations were necessarily suspended as to each partner during his life. It became enforceable as an incumbrance, if at all, against his estate; after his death, and not before.

[2] The result is that the decedent left an estate; and the contract must be deemed to operate as a claim or incumbrance upon it either in part or in its entirety, in the same manner as a contract to make a will. Though therefore the contract be deemed enforceable as one to make a will, the question remains: Is it effective as against the widow of the decedent?

If in the absence of a contract the deceased partner had made a will disposing of his property to his brothers in the manner described by this contract, doubtless it would not be claimed that such will could be effective as against the widow.

Code, §3376, provides:

"The survivor's share cannot be affected by any will of the spouse, unless consent thereto is given," etc.

We have held that this section of the statute is applicable to personal property as well as to real estate. *Ward v. Wolf*, 56 Iowa, 465, 9 N. W. 348; *Linton v. Crosby*, 61 Iowa, 401, 16 N. W. 342; *May v. Jones*, 87 Iowa, 188, 54 N. W. 231; Code, § 3362. The statute therefore is an impediment to the operation of the husband's will upon his estate in such a way as to deprive the widow of her distributive share of either the personalty or the realty.

The question still remains whether the fact that the husband during life contracted to make such a will, will avoid the operation of section 3376. May the wife assert the impediment of the statute against the operation of such contract? If the statute disabled the husband from making a will detrimental to the wife, could
252 the husband nevertheless make a valid contract obligating him to make such a will? Doubtless it were more accurate to say, not that the husband was disabled from making the will, but that the operation and effect of his will would under the statute be subject to the consent of the widow so far as her distributive share was concerned. A contract to make a will would be fully performed by the making of the will. Would the operation and effect of such will be subject to the provisions of section 3376? We answer yea. Though in this case no will was in fact made, the contract could nevertheless be enforced to the same extent as though the will had been made and not otherwise. The enforcement of the contract is subject to the limitations of the statute because the will itself would be subject thereto.

We are not unmindful that during the lifetime of the decedent there was no legal impediment to his disposing of his personal property. He could have sold it; he did not sell it. He could have transferred it perhaps even without consideration; he did not transfer it. There was no transferee. At this point we are not concerned with forms. We look to the substance of the property rights of this decedent. Though in form he transferred all his property to the corporation, he was the joint creator of the corporation and owner of one-fourth thereof. Though each of the four parties transferred his stock in severalty to all of them jointly, and thereby changed the form of his property right, he still owned the substance thereof. This is not saying that the contract was void and of no effect as against the decedent's estate. It is only saying that it is not effective to defeat the widow's right to her distributive share.

Construing and applying the statute broadly (sections 3352, 3376) to the purpose of its enactment, it leaves no opening for ingenuity to enable a husband to remain during life in full dominion of his property and yet to dispose of the same after death to the exclusion of the widow from her distributive share.

Personal property, it is true, would be subject to the good-faith indebtedness of the husband; but, as against the widow, it would not be subject to a mere scheme to absorb it. This does not imply that these brothers had a conscious purpose to wrong any surviving widow. Doubtless their only active purpose was to create the enterprise and to draw upon it for the care of all who were dependent upon them either severally or jointly. Though the contract im-

posed upon them no obligation in respect to any surviving widow, the surviving partners do recognize an obligation either moral or legal to care for the plaintiff as such surviving widow and they offer to provide her generous support. But the specific motive is not controlling. The right of a widow to her share of the estate, whether legal or equitable, owned by her husband at the time of his death, is impregnable; or it is not existent at all. This right does not arise out of any contract. Nor can she be required to accept generosity, however princely, in lieu of it.

[3] II. In our foregoing discussion we have assumed that the mutual promises were a sufficient consideration to support the contract as between the parties. It must be noted, however, that these mutual promises all carried the same infirmity. Each and all were assailable upon the same ground as for failure, or partial failure, in that more was promised than could be performed. If this decedent had survived his brothers and had sought to enforce their promises, he would have encountered the same impediment as they have encountered here. So that the performance permitted here is as full as the consideration is valid. By their very nature, the mutual promises were exactly equal in value as mutual considerations. Between performance and consideration, therefore, there is complete mutuality in that the one is the full measure of the other.

Performance is partial because the validity of the promised consideration was only partial. The partial failure of consideration would be a just ground of offset against full performance. No legal damage accrued therefore even as against the decedent or his estate. In assuming the validity of the consideration of the contract, therefore, we do so with this qualification.

This opinion is supplemental to the original opinion and is not a substitute therefor. One reason therefor is the vigorous attack made upon the original opinion as being in conflict with *Stewart v. Todd*, 173 N. W. 619. The opinion in the latter case and the original opinion herein were both written by the late Justice Gaynor. No reference was made in the original opinion herein to the *Stewart Case*. An examination of that case will readily show how little occasion there was that such reference should be made. The contract in that case was one between husband and wife, and its enforcement was sought and obtained by the surviving husband as against the collateral heirs of his wife. The question whether a contract for his entire estate after death, between the deceased spouse as grantor and a third party, is subject and inferior to the statutory right of the wife, or husband, was in no manner involved therein. Such is the controlling question in this case. We find no conflict in the two opinions.

The petition for rehearing is overruled.

DISSENTING OPINION ON REHEARING

SALINGER, J. (dissenting): I. The majority declares:

"The justices concurring in the majority opinion heretofore filed are still satisfied that the correct result was announced in such opin-

253 ion. The argument in support of the petition for rehearing indicates a misconception of the reasons which have impelled us to this result. For this reason, we are disposed to add to the former opinion this further word of argument."

Even if one note but part of the well-made attacks upon said opinion, he will find that counsel have not misconceived it, and that it should not have the foregoing approval.

(a) That opinion urges against the contract defendants have, that it deals with personal property owned by a partnership. Such holding is bad law and conflicts with our own and other decisions. In *Stewart v. Todd*, 173 N. W. 619, we sustain such a contract though its subject is confessedly partnership property, including personal property. In *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, the contract enforced deals with nothing but the personal property of a partnership. While *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998, involves no partnership, it does uphold a survivorship agreement that deals with property both personal and real. And see *Smith v. Douglas County, Neb.*, 254 Fed. 244, 165 C. C. A. 532.

(b) One argument of the opinion is that a "commercial enterprise" cannot "be affected by a joint tenancy." This is irrelevant and fallacious, because the contract gives rights even if it were true that such enterprise may not so be affected, and because this contract deals, not with a commercial enterprise, but with future accumulations of that enterprise. As well say that money received from land is not personal property because the source is real property.

(c) It not only "construes" what needs no interpretation, but it erroneously interprets plain words away. The contract says, repeatedly, that each signor and his estate shall, unless he be the last survivor, have no interest in or rights to the partnership property, "except such share * * * as shall be actually received by each or shall be paid upon the order of each with the consent of the others from the general funds or income of said business." The opinion declares that this is not a limitation upon inheritance rights, but merely a provision to guard against extravagance. This not only disregards the plain words of the contract, but is against reason. In such a contract as this the share of any who die first is necessarily limited to what he has drawn in his lifetime. If all that belongs to him passes to another on his death, all he can have is what he has already obtained. He can add nothing to his estate after he has died.

(d) There should be no approval of the pronouncement that "estates in joint tenancy have in modern times ceased to be in favor with the courts." The statute sanctions such tenancies. See *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116. At mildest, this is a declaration that the law of the land may be dis-favored by the courts.

II. The "supplemental" opinion must be tested by itself. It neither supports nor is it supported by the original opinion. The

"supplemental" opinion is neither a supplement nor a "further word of argument." The original does not touch what the supplemental one advances.

The majority says:

"In the last analysis, therefore, we have before us a contract; nothing more, nothing less. Being a contract, it may be enforced as such unless there be some legal impediment thereto"—and then elaborates matter utterly irrelevant to the issue so stated.

This shows that the only material question has been forgotten for the time being—and it tends to explain why the true issue seems not to have been determined at all.

What does it matter that "in determining the effect of the contract we cannot add to its terms the legal fiction involved in a common-law joint tenancy," or that "the alleged joint tenancy was not created by act of any third party, but was created, if at all, solely by the contract of the alleged tenants," or that the contract does not purport "in terms to create a common-law joint tenancy." Surely, it cannot matter "that the theory of joint tenancy in a common-law sense is not available to carry the appellants any further than the terms of their contract carry them." If they are entitled to relief to the extent to which "the terms of their contract carry them," it cannot matter how many things exist which give them no relief.

In a word, here is no question of names. No dictionary can rightly decide this suit. Rights ought not to be denied because there is a quarrel over the name of the rights, nor because immaterial things may or may not be done. As said in *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116:

"Laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the courts refusing to give it effect according to its clear intent?"

And see *Rood*, Wills, § 53.

III. It is stressed that the four signers created a corporation with themselves as sole shareholders each receiving his pro rata in shares, and that thereupon each purported to transfer his shares by indorsement and delivery. The preface of the court is:

"We are not concerned with forms. We look to the substance of the property rights of this decedent."

But is that done?

The plaintiff declares over and again that this corporation and these shares were and remained the property of the partnership and her husband died seized "of an undivided interest in all the property of the partnership, which partnership property includes all the capital stock and property" of said corporation. So, then, 254 creating the corporation and so issuing and dealing with the shares is nothing but a change of form. It should not be seriously contended by those who profess to disregard mere change in form that anything material was effected. If four partners conclude to symbolize hardware owned by the partnership by stock certificates issued to the partners, the rights of each in the hard-

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were remain unchanged. The share certificate represents the hardware. I agree with the majority that—

"The property still remained in the dominion of the same parties. Its benefits still accrued to them. No fifth party had acquired any interest in or incumbrance thereon. * * * If they had then attempted a partition as between themselves, each must have received his one-fourth thereof."

But I cannot follow it in forgetting the effect of its statement. That effect is that the mere creating of the corporation and issuing said stock has no bearing at all upon the contract rights of the parties.

As to the inquiry, "to whom did he indorse and to whom did he deliver," and the statement, "there was no transferee and no taker of delivery, they all put their shares into a common receptacle and locked them in the safe to await eventualities," I have to say I shall later attempt to show that all this is immaterial. It foreshadows a position more fully developed by the majority elsewhere, and is indicative of the thought that there was no delivery of the stock shares. It may well be said that these shares were in the possession of all four of the contracting parties as long as they lived, and on the death of one these continued in the possession of the survivors, and that the deposit of the stock nominally in the deceased member and the assigning by him in blank amounted to a constructive delivery by him at the time he executed such assignment. But I need not pursue this now. The most the argument of the majority comes to is that the creation and assigning of the shares effect nothing because delivery was lacking. If that be granted, then the issuance and attempted transfer of the shares comes to nothing. The net result in law is that each partner retained the same interest in the partnership property as if no corporation had been created by the partnership and nothing whatever had been done by the corporation. In no view was more change effected in partnership rights than if the partnership had retired from business and put all the accumulations therefrom into government bonds. All that would accomplish is that a share in business accumulations would become a share in government bonds.

IV. But, as already indicated, lack of delivery, the retention of joint possession, and the preserving equal access to each partner are amplified in another branch of the argument of the majority. The sum of that argument is that somehow this suit is affected by lack of disseizin of one contracting party, and by failure to deliver to and vest in the other party, and that there is fatal uncertainty as to where title is lodged. It is an argument that has made much bad law, on so-called contingent remainders. Can it be possible that a contract of survivorship wherein several agree that the one last remaining alive shall have all the property of the others is in any way affected by delivery, disseizin, and vestiture? If that be so, it is inexplicable why a survivorship contract was ever upheld. For in each and all the cases of such contracting no party was disseized, no party was vested with title to what he did not already own, and neither party delivered anything to the other except the contract

itself. In each and all of such cases each contracting party kept full control of and access to the individual property of his that had been made the subject of the contract. In each of them it could have been said, "There was no transferee and no taker of delivery." And what an absurdity it would be to require mutual delivery in such cases. A. owns 10 horses; B. also owns 10. Can they make no effective agreement that the survivor shall have all that remain of the 20 unless when the parties sign each delivers his 10 horses to the other? To follow that to its end, the moment the exchange was made it would seem to become necessary to keep on transferring and retransferring. Must one who puts his farm into a survivorship contract deliver his farm at the time when he executes the contract?

In the supposed case of the contract where each party has 10 horses, will it invalidate the contract because both parties had free access to both sets of horses and, for that matter, if they both have control of both sets? In the Stewart general store case, not an item of the stock was ever delivered into the sole control or possession of either party to the partnership contract. Every item was at all times as much under the control and in the possession of one partner as of the others. There was never a moment when one party did not have equally full access to everything belonging to the partnership. The benefits of the existence of the general store "still accrued" to both contracting parties. It was true there, too, that no party other than the ones contracting "had acquired any interest or incumbrance thereon." There, as here, if the parties had attempted partition as between themselves, "each must have received his one-fourth ($\frac{1}{4}$) thereof." It is true that in all cases of contract of survivorship, (in the sense the words are used by the majority) "they all put their shares in a common receptacle and locked them in the safe to await eventualities." That is to say, in the Stewart Case the joint property was kept in the common receptacle, the partnership store, and kept there even as

255 things are kept in a safe, to await the eventuality, the death of one partner, on the happening of which the property would be removed from the common receptacle where it was constructively locked up and be given to the survivor. In the Stewart and in all like cases, just as here, the property "still remained in the dominion of the same parties." It was true there, as here, in the sense that the majority uses the words here, that "there was no transferee and no taker of delivery." As said, no survivorship contract should ever have been upheld if here is the true theory, because not one could meet the test now formulated. Their very essence is that benefits and dominion shall be temporarily retained with access and control, and that the final vesting of title must wait the happening of the contracted-for eventuality. There is title in all the parties subject to the contract limitation that the last survivor shall have sole title.

V. It is not unknown in the law that title vests even though full use and enjoyment be postponed, and even though it may not, at the instant when title is said to vest, be known with definiteness who will ultimately have full title. Here, there was an agreement that the

survivor should have "the property then owned by the said partnership which should be and become the property of the survivor member of the said partnership." I think it is not straining to say that, if vesting and divesting were material, each partner was so divested and each other so invested as that the title remained inchoate in the four until three had died, and that then full title vested in that survivor. We held in *Wood v. Logue*, 167 Iowa, 436, 149 N. W. 613, Ann. Cas. 1917B, 116, that the last survivor becomes the sole and unqualified owner. Let me repeat that, if divesting and vesting be essential, there was the same flaw in every case wherein survivorship contracts have been upheld.

In *Allbright v. Hannah*, 103 Iowa, at page 102, 72 N. W. at page 422, the contract was that the plaintiff should have certain lands upon the death of one Remy, or when Remy and his wife were done with it, and we said that this "was either the present transfer of the fee, subject to a life estate, or an agreement to will the property to the plaintiff," and that, whichever it may have been, "it was good if plaintiff accepted it and acted thereon, and took possession of the land thereunder." This may not fit the present discussion with absolute exactness, but it does settle that for the purposes of sustaining survivorship contracts that may be deemed a present transfer of the fee which for some purposes is not deemed to be such transfer.

Recurring to the uncertainty as to who will be the ultimate owner or beneficiary, that difficulty, too, was present in the cases wherein contracts such as this have been held to be valid. In *Wood v. Logue*, and in *Stewart v. Todd*, it was as uncertain who would get full title by becoming the last survivor, as it was uncertain when the contract at bar was signed which of the four brothers would live the longest.

On the reasoning of the majority, what this court has held as to contingent remainders is bad law, and there is no defending such decisions as that in *Woodard v. Woodard*, 184 Iowa, 1178, 169 N. W. 464, and the numerous decisions therein cited in support. In that case it was contended that when the will was executed it could not be known what great-grandchildren would be in being when the time for ultimate transfer and vesting arrived, and that therefore the remainder was a contingent one. We answered that when said will was executed named great-grandchildren were in being with present capacity to take; that therefore, though it could not then be known that any of these great-grandchildren would be living when the life estate in the grandchildren lapsed, or that later born ones would not then be in esse, yet the remainder was vested; and we said that—

"Unless something not yet discussed avoids it, the great-grandchildren took title on the day the testator died."

The effect is that there was a vesting in the class known as great-grandchildren though no one could tell who, if any one, would be in the class when the time for distribution came. On this line of decisions it follows title was sufficiently vested in each of the brothers, because it was agreed that one of the four in their class should at

some time have full title; and the fact that it could not then be known which one in the class would be such ultimate beneficiary does not prevent a sufficient vesting of title in the class.

VI. I take it on the authority of *Stewart v. Todd*, that, assuming the contract here to be on sufficient consideration, it would be enforced against heirs. If then it is not enforceable, it must be because the wife of a party to this contract is attacking it. I have already attempted to show that when Charles died his interest in the partnership property was incumbered, or perhaps it is more accurate to say he had parted with it conditionally, to wit, on the condition that it should go to the last survivor. If that be sound, his wife took no more than an heir could because there was nothing for either to take. On that reasoning the case would stand precisely as if the husband in his lifetime had for a sufficient consideration made a conditional sale of his property, with delivery to be made when he died—or as if, though he died seized of it, it was mortgaged to its full value. It is manifest that in such case the widow could take nothing.

It seems to me the whole controversy at this point is disposed of by the single pronouncement in *Maybury v. Brien*, 15 Pet. 21, 10, L. Ed. 646, wherein the Supreme Court of the United States ruled that "the mere possibility of the estate being defeated by survivorship, prevents dower" from attaching. I repeat that, if the contender were other than the wife, no one would pretend to say that this contract is not enforceable; and I add it is immaterial that the wife is attacking, because the act of her husband in his lifetime worked that no marital rights attached to the property in question at the time when the husband died—that he died seized of nothing.

Since it must be conceded that decedent in his lifetime had the right to give his property away or to sell it for any price that pleased him (*Lunning v. Lunning*, 168 N. W. 140; *Metler v. Metler*, 19 N. J. Eq. 457), it would seem that the death of the seller could not deprive a purchaser from him of property sold to him to be delivered after death, merely because decedent had been more provident than is one who throws his property away or parts with it for an insufficient price. One can contract as to what shall be done after he dies. *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530; *In re Neil*, 35 Misc. Rep. 254, 71 N. Y. Supp. 840, and Page, Cont. § 397. If there be the right to sell if he yield possession, the sale must surely be as effective where, in addition to the purchase price, he demands and obtains the additional privilege of using the property without cost to himself until he shall die. If, had he not exacted this additional benefit, the property was lost to his wife, how can it be retained for her because he obtained an enlargement of the price by the retention of possession?

VII. This brings me to the major argument now made by the court. It rests upon a perfectly sound premise, to wit, that the husband may not by will cut off the distributive share of the wife. The unsound deduction from this sound premise is that the defendants stand as if they were seeking to assert a will against the distributive share of the plaintiff. The argument is this: (a) This is a con-

tract to make a will which has been breached. (b) Whensoever such an agreement is made and broken, the remedy of the party not in fault is that he is to be treated as if the will agreed to be made had been made; and he must be dealt with as one basing his rights upon a duly executed testament. I answer, first, that whatever may result where a contract to make a will is made that is immaterial where no such contract was made, and that here there is no thought of making an agreement to make a will, and no such contract was made. And whatever may result from the making and breaking of a contract to will it does not result here, because the contract here is the permissible agreement that the future rights of the parties shall be based on the fact of survivorship (17 Am. & Eng. Encyc. Law, p. 65)—was a lawful stipulation as to what should at the death of all but one be done with the accumulations the parties were then engaged in creating. Said text states on the authority of *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202, *Pritchard v. Walker*, 22 Ill. App. 286, and *Jones v. Cable*, 114 Pa. 586, 7 Atl. 791, that the fact that survivorship is no longer regarded as an incident of joint tenancy does not invalidate contracts which definitely provide that future rights of contracting parties shall be based on the fact of survivorship, and that—“Although the right of survivorship as an incident to joint tenancies be abolished by statute, it may nevertheless be given by a will or deed, either expressly or by necessary implication, and that such a statute does not prohibit contracts that make the rights of the parties dependents upon survivorship.”

VIII. But assume that here is a broken contract to make a will, does it follow therefrom that this creates a will, and that therefore these defendants are in the position of seeking to deprive the distributive share of a widow by what amounts to an attempt to take it from her by will? That can be true only if on breach of a contract to will a will results. Such a contract, though broken, remains just a contract, and the remedy on breach is a complaint of the breach, with demand for damages, quantum meruit, or other remedies allowed for breach of contract. *Hammerstein v. Thompson*, Clark & F. 245; *Henry v. Rowell*, 31 Misc. Rep. 384, 64 N. Y. Supp. 488; *Leahy v. Campbell*, 70 App. Div. 127, 75 N. Y. Supp. 72; *Furman v. Craine*, 18 Cal. App. 41, 121 Pac. 1007; and 1 *Schouler, Wills* (5th Ed.) §§ 452-454; *Allbright v. Hannah*, 103 Iowa, 101, 72 N. W. 421. Or the remedy may in some cases be recovery of the value of what claimant has given for the promises. *Frost v. Tarr*, 53 Ind. 390; *Shakespeare v. Markham*, 10 Hun. 311. Or quantum meruit. *Taylor v. Wood*, 4 Lea (Tenn.) at page 510; *Jincey v. Winfield*, 9 Grat. (Va.) 708; *Beach, Cont.* p. 786; 2 *Elliott, Contracts*, p. 454, note 20. Both as to substance and remedy such a contract is but a contract—never a substitute for a “will.” 3 *Elliott, Cont.* pp. 218, 797; 1 *Beach, Contracts*, p. 487; *Bishop, Cont.* 516, 518; *Page, Contracts*, p. 2466. “There is nothing peculiar about contracts to make provisions by will. An actual contract must be shown. The parties must have been competent. Their minds must have met on a certain and definite agreement, unless the facts imply a promise which would sustain an action on quantum meruit. *Rood, Wills*, § 54.

The inquiry of the majority whether the agreement here be "the equivalent of a contract to make a will" is then an immaterial inquiry; for, if it be conceded to be such contract and to have
 257 been breached, not a step is taken towards putting these defendants in the position of one who is basing his rights upon a testament. As said in *Stewart v. Todd*, 173 N. W. at page 621 where it is true that the writing cannot be enforced as a testamentary instrument, it may if on consideration be enforced as a valid and binding contract. To the same effect is *Baker v. Syfritt*, 147 Iowa, 65, 125 N. W. 998. This means that a will can be a contract, too. But though a will may sometimes be dealt with as a contract, and though a deed or other paper executed as a will may be a testament, even if not in the usual form of wills, it has never been held that a contract to make a will or any other contract which is not executed with statute formality can be substituted for a will or be treated as being a will, either for the purpose of attack or of defense. The court may not manufacture a testament and thrust it upon a litigant and thereupon deny him rights upon the ground that he has no rights were he basing them upon a will. No writing which lacks the statute attestation is a will for any purpose. An attempted will which fails to be that because not executed as required by statute may be evidence to establish the existence of a contract to give, but is not and cannot be a testament. It ever remains a contract only. *Studer v. Seyer*, 69 Ga. 125; *Walpole v. Orford*, 5 Ves. Cr. Rep. 402. That is so true that it has been held that contracts to make a will are not entitled to probate because "contracts cannot be probated." *Rood Wills*, § 51a. And the courts have gone so far as to deny probate to instruments that were wills because they were executed in pursuance of a contract such as made the will irrevocable. Sir John Nicholl said: This very irrevocability "destroys the very essence of the will and converts it into a contract, a species of instrument over which this court has no jurisdiction." And see *Rood Wills*, § 52, and *Hobson v. Blackburn*, 1 Addams, 274, 275; *Schumaker v. Schmidt*, 41 Ala. 454, 4 Am. Rep. 135; and *Anderson v. Eggers*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570.

Because of this very remarkable pronouncement by the majority, this point, that here there is no will, cannot be overemphasized.

IX. Availing itself of the statement that up to a certain point sufficient consideration has been merely assumed, the majority finally declares that there is something defective in the consideration.

It is not denied that mutual promises may be a sufficient consideration. It cannot be denied that here there were mutual promises, for the contract recites that the consideration is "the service of each of us rendered in the business of life insurance or of the income to be derived therefrom and of mutual stipulations herein contained." It is not denied that such a writing imports a consideration. It cannot be denied that such service was rendered. What is intended is a claim that the contract is injuriously affected because complete performance of part of the mutual undertakings is impossible. It is said:

"In some respects the contract attempts the impossible. It attempted to dispose of the respective interests of the partners and yet to retain the same; to do and yet not to do; to give and yet to withhold. In the nature of the case such contradictions are not enforceable."

I have said all I can about the alleged impossibility of performance. That assertion of impossibility is but a repetition of the assertion that no contract can work to deny this widow a distributive share, and that no attempt has been made to do so except to assert a will. If these be not sound positions, there is no impossibility.

9a. Upon the alleged impossibility rests a claim of partial failure of consideration. There is no such issue in the case. It is true the petition alleges that "said contracts are null and void for the reason that they are without consideration and contrary to public policy," and "as a transfer of property are without consideration and colorable only." This is a plea that the contracts are nudum pactum; that there is no consideration. Such a plea does not raise failure of consideration, or impossibility to give the full consideration. Such failure and part failure are matters which, under section 3629 of the Code, must be "specially pleaded." It is said in 13 C. J. p. 741:

"A plea of partial failure of consideration in an action on a sealed instrument reciting a consideration is bad. And at common law partial failure of consideration could not be set up as a defense, unless the transaction was fraudulent in its inception. Defendant was obliged to resort to a cross-action to recover his damages, unless he could show an entire failure of consideration."

While it is true the same text declares that now, either by statute or judicial determination, it is generally permitted to interpose the defense of a partial want of consideration or of failure of consideration in the action on the contract (thus preventing circuity of action), of course, that does not say that a denial of all consideration in a written instrument which imports a consideration is a good plea to raise a partial lack of or a failure of consideration. The text referred to makes that plain by the statement that, while such defenses may now be interposed, that is so only "when the facts constituting the defense are specially pleaded or set out by way of recoupment or as a bar to so much of the demand as may be thus answered." And I think that *Mueller v. Batcheler*, 131 Iowa, 650, 109 N. W. 186, as analyzed in *Stewart v. Todd*, holds that this contract was fully supported by lawful consideration. At least, it is a decision that the mutual promise creating the survivorship will support the contract.

X. I concede freely it may not be so clear to others as it is to me that the decision here is an absolute impairment of the right of contract. But I do think that all minds might agree that it is at least a most serious question whether there has not been such impairment. It would seem that the least that could be done by the majority would be to give some recognition that such a federal question exists, to the end that, if the view now prevailing be here adhered to,

an opportunity be given to have the Supreme Court of the United States consider this case.

XI. One of the things claimed by the plaintiff as partnership property is the proceeds of insurance policies in \$58,000. I am utterly unable to see why she should be permitted to prevail as to this, no matter what is done about the general contract. This insurance was effected upon the lives of each of the four contracting parties by policies, in terms, made payable to the other three brothers, or survivor of them. The insurer is liable to no one but the beneficiaries thus specifically named. The widow of the deceased can have no possible claim against the insurer. There is no contractual relation between them. As said, I cannot conceive on what theory she is permitted to share in the proceeds of this insurance which, in any view, is the property of some one other than herself—is an obligation that can rightfully be paid only to others than herself.

XII. I have to say further the evidence in this record demonstrates positively and unequivocally that the widow knew of and acquiesced in and profited by the joint arrangement evidenced by those contracts, and for many years. In my opinion, she should be held to be bound by an estoppel, as was the widow in the Allbright Case, 103 Iowa, 98, 72 N. W. 421, where there was less foundation for the estoppel than there is here.

One may grant, for the sake of argument, that this widow should not have been placed by her late husband in the position I find her in, and that judges as men may properly entertain a desire that she should have a distributive share in this property; but the judges should bow to the law as they find it, even if it results that what is desirable and abstractedly equitable may not be accomplished.

I would reverse.

259

In the Supreme Court of Iowa, April 5, 1921

Supreme Court No. 32408

[Title omitted]

Appeal from Polk District Court

SUBMISSION OF CAUSE ON SECOND PETITION FOR REHEARING

This cause is submitted on appellant's petition for rehearing on file and oral argument of counsel for the petitioner.

SR 31-331.

I hereby certify that the foregoing is a full, true and complete copy of the submission entry of April 5, 1921, in the above entitled case, as true, full and complete as the same remains of record and on file in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 15th day of December, A. D. 1922.

B. W. Garrett, Clerk of Supreme Court.

(Seal of the Supreme Court of Iowa.)

260 & 261

In the Supreme Court of Iowa

ANNA B. FLEMING

vs.

ROBERT J. FLEMING et al., Appellants

Appeal from Polk District Court.

JUDGMENT RECORD ENTRY ON SECOND REHEARING

In this cause, the Court being fully advised in the premises, file their written supplemental opinion modifying their former opinion filed herein, and Modifying and Affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby modified and affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellants pay the costs of this appeal, taxed at \$54.95, and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court, filed on the 28th day of September, 1921, in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 15th day of December A. D. 1922,
B. W. Garrett, Clerk of Supreme Court.
(Seal of the Supreme Court of Iowa.)

262

OPINION ON SECOND REHEARING

(Supreme Court of Iowa, Sept. 28, 1921)

(No. 32408)

FLEMING

v.

FLEMING

1. Insurance *116 (1), 138 (1)—Partner has insurable interest in life of other partners; joint policy valid.—Each member of a partnership has an insurable interest in the life of every other member, and an undertaking of an insurance company to pay death loss upon any life to surviving members of firm is legitimate.

*For other cases see same topic and key-number in all key-numbered digests and indexes.

2. Dower *17—Proceeds of insurance policy held not assets of firm.—Where four partners carried insurance, undertaking of company being to pay the death loss upon any life to the other three members of the firm, expense of insurance being borne by beneficiaries, the proceeds of the policy on death was not an asset of the firm in which widow of deceased partner had an interest, in the absence of pleading and proof of facts aliunde which would equitably impress a trust upon such proceeds in the hands of the surviving partners.
3. Appeal and error *835 (2)—Point that opinion overrules prior decision and hence denies due process not noticed on second rehearing.—The point that opinion of court overruled a prior decision, and hence was a violation of the Constitution of the United States in that it deprives a person of property without due process of law, made for the first time on second rehearing will not be considered.

Appeal from District Court, Polk County

C. A. Dudley, Judge

On second rehearing.—Former opinions and decree in court below modified. For former opinions, see 174 N. W. 946; 180 N. W. 206.

A. B. Cummins, Parrish, Parker & Miller and W. E. Miller, all of Des Moines, for appellants.

Parsons & Mills, of Des Moines, for appellee.

EVANS, C. J.: It is to be conceded that our former opinions (174 N. W. 946, 180 N. W. 206) are incomplete in their discussion, in that the item of "life insurance" is not considered therein. It is a matter of some doubt whether the pleadings make any issue as to such item. The only reference thereto in the petition of plaintiff is contained in paragraphs 6 and 11. Paragraph 6 was as follows:

"That plaintiff's deceased husband carried life insurance in the amount of \$58,000."

Paragraph 11 averred that the three defendants had collected such life insurance, and appropriated the same to their own use. It was not alleged that the plaintiff was the beneficiary of the policy; nor was any other fact pleaded as a basis for the claim that the insurance proceeds belonged to her either in whole or in part. The trial court filed a lengthy written opinion in the case, comprising apparently a complete discussion of all points presented for his consideration. No reference is made therein to the item of insurance. The opening argument of plaintiff as appellee purports to be a full discussion of the case, but no reference is contained therein to the insurance. However, the decree entered by the trial court did in terms declare the insurance proceeds to be a part of the partnership property. The implication from such finding would naturally be that the plaintiff was entitled to recover the one-eighth part thereof. The only

*For other cases see same topic and key-number in all key-numbered digests and indexes.

disclosure of the detailed facts pertaining to such insurance is to be found in the answer of the defendants, appellants here, and in the evidence in their behalf. It is to be said also that the appellants made proper point in their opening argument here, calling in question that feature of the decree entered below. It is true that the basis of their claims of right to such proceeds which was put forth by them with greatest emphasis was the contract which we have already considered in our former opinions, and which we hold to be ineffective as a bar to the widow. But they did base their claims of right also upon other grounds which we here consider. If the item had not been specified in terms in the decree, we should be inclined to hold that it was not within any material issue tendered by the petition. Inasmuch as the decree did specifically purport to adjudicate it, the appellants are entitled to demand our consideration of it in a specific sense.

263 & 264 [1, 2] The undisputed facts as they appear from the pleadings and the evidence of the defendants are that the "life insurance" in question was payable to the three brothers, appellants herein. It appears that similar insurance was carried upon the life of each member of the firm in favor of the other three members thereof. The undertaking of the insuring company was to pay the death loss upon any life to the other three members of the firm. Such form of insurance was legitimate. Each member of the firm had an insurable interest in the life of every other. The expense of the insurance was borne by the beneficiaries. It appears also that the insuring company held all these policies as security for loans negotiated to the firm. The method of collection of these policies upon the life of decedent was that the insuring company applied the full proceeds as a credit upon the indebtedness owing to it by the firm and the members thereof. It is manifest therefore that upon the face of the insurance contract the three defendants had the legal right to the proceeds of the "death loss." They and they only could have maintained an action therefor against the insurance company. If there be facts aliunde which would equitably impress a trust nevertheless upon these proceeds in the hands of these defendants, it was incumbent upon the plaintiff to plead and to prove such facts. Nothing of that kind was attempted by her. The manifest objective of her petition was to obtain an adjudication that the contract under attack was ineffective to bar her right of distributive share. The emphasis of the litigation was concentrated upon that proposition. We have sustained the contention of the plaintiff in that regard. But, even so, such contract has no effect whatever upon the question of the defendants' right to the insurance proceeds. They do not take such proceeds under and by virtue of the contract under attack, neither are they forbidden to take the same thereby. They take such proceeds under and by virtue of the insurance contract and of that alone. Their right thereto is neither greater nor less by reason of the contract of alleged joint tenancy.

We reach the conclusion therefore that the item of "life insurance" proceeds be eliminated from plaintiff's recovery, and that

the decree entered below should be modified to that extent. In all other respects, the petition for rehearing is overruled.

[3] II. The appellants urge upon us very earnestly that the effect of our holding here is to overrule prior decisions, and therefore to deprive appellants of their property without due process of law in alleged violation of the Constitution of the United States. The premise upon which such plea of unconstitutionality is based is negated by the opinion complained of. It does not purport to overrule prior decisions. Appellants' contention to such effect is argumentative only, and is not sustained by us. Moreover, if the premise were conceded, and if it were deemed correct to say that the overruling of a prior decision by an appellate court of a State is a violation of the Constitution of the United States, such point would have been just as available to the appellants in their original argument as in their petition for rehearing. No such point was therein made.

We are asked to recognize the point now made as presenting a Federal question. If we could properly do so as a matter of sincere deference to the higher court or as a matter of courtesy to the distinguished counsel, we should not be reluctant to make such declaration as would enable a review of our decision by the higher court. But judicial candor compels us to say that we see no Federal question involved. The decree below will be modified as above indicated, and otherwise affirmed.

265 In the Supreme Court of Iowa, April 4, 1922

Supreme Court No. 32408

[Title omitted]

Appeal from Polk District Court

SUBMISSION OF CAUSE ON THIRD PETITION FOR REHEARING

This cause is submitted on appellant's petition for rehearing and resistance on file.

SR 31-435.

Ordered by the Court and entered of record on the 4th day of April, A. D. 1922.

A true copy.

Attested:

B. W. Garrett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

266 In the Supreme Court of Iowa, September 23, 1922

No. 32408

[Title omitted]

Appeal from Polk District Court

ORDER OVERRULING THIRD PETITION FOR REHEARING

Appellant's petition for rehearing having been fully considered is overruled. Ordered that procedendo and execution issue.

Ordered by the Court and entered of record on the 23rd day of April, A. D. 1922.

A True Copy.

Attested:

B. W. Garrett, Clerk of Supreme Court.
[Seal of the Supreme Court of Iowa.]

267

[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

PETITION FOR WRIT OF ERROR

[Filed Dec. 16, 1922]

To the Honorable Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa:

Now come the said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, impleaded as a partnership, and John A. Fleming, Administrator of the Estate of Charles Fleming, deceased, the said defendants and appellants, and on this, the 14th day of December, A. D. 1922 apply for a Writ of Error from the said Supreme Court of Iowa to the Supreme Court of the United States, and as and for their Petition for Writ of Error state:

That on the fifth day of July, A. D. 1916, the said Anna B. Fleming, plaintiff, appellee, filed in the office of the Clerk of the District Court of Iowa, in and for Polk County, a Petition in Equity, duly verified. That on the eleventh day of September, A. D. 1916, the defendants filed in the said Court and cause a duly verified Answer to said petition. And between said Petition and the said Answer the following issues were developed and the following matters respectively alleged, admitted, qualifiedly admitted, and denied, to-wit:

268 It is admitted that on the second day of January, 1881, plaintiff was married to Charles Fleming, now deceased; that he died in Polk County, Iowa, on the 15th day of January, 1916, leaving no last will and testament and no issue, and leaving surviving him the plaintiff, who is his widow, and three brothers, to-wit: Stanhope Fleming, Robert J. Fleming and John A. Fleming, and admitted that the defendants herein and the plaintiff are residents of Des Moines, Polk County, Iowa.

Defendants admit that plaintiff joined in petitioning for the appointment of John A. Fleming as administrator of the estate of Charles Fleming, deceased, and deny that this was done at the solicitation of the defendants.

They admit that they claim to own jointly, and aver that they do own jointly, as surviving joint tenants, all of the property in which their deceased brother, Charles Fleming, had an interest during his lifetime, his household effects alone excepted, and that the said joint estate in which said Charles Fleming was interested in his lifetime did not and does not include the household effects of which the said deceased brother of defendants was possessed. That as to whether plaintiff learned for the first time at the time she joined in a petition that said John A. Fleming be made administrator that said brothers claimed to own all the property of her deceased husband save and except the exempt household goods, and as to when plaintiff learned for the first time of the nature, character and extent of the interest of these defendants in the alleged property of Charles Fleming, deceased, defendants say they have neither knowledge nor information sufficient to form a belief.

269 Defendants deny that plaintiff's deceased husband and these defendants had for all of their business lives been associated together in business as a partnership in all their business transactions; deny that they owned all of their property in equal proportions; and deny that plaintiff's deceased husband died seized of an undivided one-fourth interest of all of the partnership property, subject only to a proportionate share of the partnership debts.

The defendants admit that they jointly, with their deceased brother, formed a corporation in the year 1901, which corporation was known as "Fleming Brothers, Incorporated". They deny that the stock in said corporation was equally divided among the four brothers, 2,500 shares to each; deny that there was partnership property and that a fourth thereof was owned by plaintiff's deceased husband, and deny that among said alleged partnership property was a certificate of 2,500 shares of stock in the Fleming Brothers, Incorporated, in the name of Charles Fleming. They deny that said stock was in any wise divided except nominally, and say that said nominal division was as follows:

About the year 1913, pursuant to the contracts set out in the Petition of plaintiff, certificates aggregating 2,500 shares were issued by said corporation in the name of each of the four brothers, joint owners and tenants, as aforesaid; that upon the issuance of said certificates each of the four brothers, Charles Fleming included, forthwith endorsed in blank the certificate or certificates issued in the

name of each, and each of the four brothers, as joint tenants, thereupon forthwith deposited all of the certificates, pursuant to said contract, in a common receptacle in their office, to which each and all of the four brothers, as such joint tenants, had access at all times; that

270 in truth and in fact the entire stock of Fleming Brothers, Incorporated, was at all times and now is owned jointly by Fleming Brothers, as joint tenants, and by the survivors or survivor of them in the case of the death of any of the joint tenants. They expressly deny there was ever any division of the stock of Fleming Brothers, Incorporated, among the four brothers, but aver that Fleming Brothers, Incorporated, is now and at all times has been owned as a joint tenancy by the joint tenants aforesaid, and the survivor of them.

They deny that there stood also in plaintiff's deceased husband's name at the time of his death certain real estate, which it is alleged is now claimed to be owned by the three surviving brothers, the defendants herein. They aver that any and all real estate which at the time of his death stood in the name of Charles Fleming was at all times and is the property of Fleming Brothers, with the incident of survivorship as between them; they aver that all such property was acquired with joint funds, and held for the joint benefit of said joint tenants, and the survivors or survivor of them. And aver that by reason of the fact that the only interest Charles Fleming, deceased, ever had in said real estate was that of a joint tenant, he, Charles Fleming, did not die seized of any estate in real estate, and plaintiff is not and never was seized of, possessed of, or entitled to any dower interest or distributive share in any real estate by reason of her relationship to Charles Fleming.

By general denial defendants deny that the Fleming building in the city of Des Moines, and other real estate, is so a part of the assets of Fleming Brothers, incorporated, as that an interest of plaintiff's deceased husband in said property exists, or ever existed, or was evidenced by his certificate of stock in Fleming Brothers, Incorporated, in the amount of 2,500 shares.

271 By general denial defendants deny the allegation that the three brothers named as defendants claim that said stock is theirs; deny they have turned in and had cancelled each certificate of 2,500 shares, and that they have turned in and marked cancelled the certificate of 2,500 shares which plaintiff alleges was the property of her deceased husband, and deny that they have reissued to themselves the 10,000 shares in certificates of one-third of 10,000 shares to each of them.

Admit that defendant John A. Fleming, administrator of the estate of plaintiff's deceased husband, filed in the probate division of this court a statement claiming that he and his brothers, Stanhope and Robert, were the owners of all of the property of Charles Fleming, deceased, save and except the said household goods, which admission is coupled with the statement that it is made as qualified or explained by the other allegations of the answer. They admit that the petition contains substantially correct copies of the three certain contracts therein set out, to-wit: One made on December 14, A. D.

1896, the second on January 23, A. D. 1897, and the third and last on the 17th day of January, A. D. 1911. They aver that under and by virtue of the said contracts they, as surviving brothers and joint tenants of Charles Fleming deceased, are the absolute owners of all of the property of every manner and nature of which Charles Fleming was possessed, or to which he had title in his life time, save and except the said exempt personal property; and they aver that the said contracts are valid and binding in all respects upon the plaintiff, and are binding upon and inure to the benefit of these defendants as the surviving joint tenants of their late brother, Charles Fleming, deceased.

272 They deny that said contracts are null and void on the alleged ground that they are without consideration, and contrary to public policy; deny they are further null and void on the alleged ground that they operate as a fraud upon this plaintiff and her rights as the widow of the deceased; deny that plaintiff is entitled to the distributive share of the property of her deceased husband, in accordance with the provisions of the statutes of Iowa; deny that the husband of plaintiff died seized of an undivided one-fourth interest in all of the property of Fleming Brothers as a partnership; deny there was partnership property which included all of the capital stock and property of Fleming Brothers, Incorporated; deny that said contracts are testamentary in character, and that they purport to do or accomplish in themselves what cannot be accomplished by will under the statutes of the State of Iowa; deny that said contracts are of no binding force or effect on plaintiff; deny the allegation that as a transfer of property said contracts are without consideration and colorable only, and not in good faith; deny they were for the purpose of defeating plaintiff's rights as a widow; deny they were concealed from her and not made known to her until after the death of her husband; deny that during all the years of plaintiff's married life she has never been advised of any arrangement such as are outlined in said contracts, and deny that during all her married life she assisted in accumulating the property of which she claims her husband died seized.

They aver that during all of the period of his business life and during the period of the marriage relation between him and plaintiff, Charles Fleming, deceased, did business jointly as a joint owner, joint worker and joint tenant with his said three brothers, and not otherwise; that during all of said period neither the said

273 Charles Fleming nor any other member of said joint tenancy conducted any business or acquired any property individually except some household effects, wearing apparel, pin money and the like; that during the entire business life and career of Charles Fleming, and the entire period of his marriage relation to plaintiff, all of the affairs of himself and these three defendants has been conducted jointly, and his personal and household expenses, including the personal expenses and pin money of the plaintiff, were paid out on checks issued and signed by Fleming Brothers; that during all of the said period each and every member of the Fleming family, in-

cluding the plaintiff, has received all personal funds or maintenance and all pin money from Fleming Brothers.

These defendants expressly deny that their brother, Charles Fleming, died seized or possessed of any estate in any property whatsoever except household effects; and expressly deny that their said brother Charles, either during his life time or at his death, owned or was possessed of or entitled to any estate of inheritance or any estate in which the plaintiff was, is, or could be entitled to a dower or distributive share or interest of any sort.

The said three writings set out in the Petition as contracts are respectively as follows:

The contract set out in the Petition, to-wit: The one of date December 14, 1896, is made, signed and executed by each of the three defendants, and by Charles Fleming, now deceased. It declares it is made in order to provide for the future uninterrupted prosecution of the business of life insurance in which the signers are then or may be hereafter engaged and mutually associated; declares it is made to fix and determine the interest of each therein

and that, therefore, the signers mutually agree and bind themselves, their heirs, executors, administrators or survivors, and all other persons, that each of the signers shall have only such share of and interest in the proceeds, earnings and income in the business of life insurance in which they are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each with the consent of the others from the income of said business.

It is agreed that such amount so paid shall fully represent the share and interest of each of the parties to the contract, at any time while the signers shall be associated together in said business, or thereafter (repeated in second writing).

It is further agreed that upon the death or withdrawal of any party to this contract, all his interest in said business shall thereupon cease and determine, and that at no time shall any accounting be made or required to be made by any party to the contract, or his representatives, executors, heirs or survivors (repeated in second writing), or any other person claiming under him, or to any person, officer or representatives, upon any basis of labor performed or money received on account of said business by any of the parties to the contract or otherwise.

It is distinctly understood and agreed between the signers that they nor any of them have or can have any property rights or money interest in said business other than that herein specified and defined, and any sum of money paid to or for any parties to the contract shall be in full of the interest of said party in said business.

The Second Contract—Date January 23, 1897.

It declares that in view of their past association and the manner of the conduct of their business, without the usual and ordinary incidents of a partnership, and to more effectually define and determine their individual interest in said business in the future, as

between themselves, and in relation to all other persons, and
 275 in order to provide for the future uninterrupted prosecution
 of said business in which the signers are now engaged or may
 be hereafter associated, they mutually agree and bind themselves,
 their heirs, executors, administrators, survivors and all other per-
 sons, as follows:

That in consideration of the service of each of the signers ren-
 dered, or hereafter to be rendered in the business of life insurance,
 or income to be derived therefrom, and of the mutual stipulations
 contained in this writing, each signer

Has and thereafter shall have only such share of and interest
 in the profits, earnings, renewals due or to become due under any
 and all contracts of insurance or commissions thereon, to whomso-
 ever nominally payable, in the business of life insurance in which
 the signers are now or any of them shall hereafter be jointly en-
 gaged, as shall be actually received by each, or shall be paid upon
 the order of each, with the consent of the others from general funds
 or income of the said business.

It is further stipulated and agreed that any and all contract rights
 and all interest in renewals or policies of insurance in the Mutual
 Life Insurance Company of New York due or to become due since
 January, 1893, all commissions earned or hereafter to be earned,
 and all bonuses allowed, payable, or to become payable in any man-
 ner, whether payable or standing in the name of Robert J. Fleming,
 or any other of the parties to this agreement, are hereby assigned
 and transferred to — for the mutual benefit of the parties hereto, to
 be used, applied and disposed of in the manner only as herein agreed
 and provided for.

It being the intention of all the parties to this agreement, and
 they thereby declare that they nor any of them have or can have
 any property rights or money interest in said business other than
 that herein specified and defined, so long as any of them shall be
 associated together in the business of life insurance.

276 Third Contract, Date January 17, A. D. 1911.

It recites that the signers are engaged in the life insurance busi-
 ness in the states of Iowa, Nebraska and Wyoming, under a con-
 tract with the Massachusetts Mutual Life Insurance Company.

That, whereas, each of the signers is the owner of one-fourth of
 the stock of a corporation organized under the laws of the State of
 Iowa, known as Fleming Brothers, Incorporated, and are also the
 owner of certain real estate and other property in which each of
 them is interested, and, whereas, they expect to acquire additional
 property hereafter, and whereas, said property now held and owned
 by the signers has been acquired by them with the understanding
 that it shall be disposed of as hereinafter set out.

Therefore, in consideration of the premises and \$1.00 in hand
 paid by each of the signers to each of the others, it is agreed—

That the partnership between the undersigned is with the express

and distinct understanding and agreement that all of the property heretofore acquired by the signers has been acquired as the result of the said partnership, and that said property now belongs to the said partnership, including all proceeds of said insurance business, with the renewals to which the parties hereto may be entitled thereon.

Upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces said stock in Fleming Brothers, Incorporated, shall be and become the property of the surviving brothers of said partnership.

And that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein.

It is recited that the premiums upon all other life policies have been paid by the said partnership, and the same is entitled to the proceeds of all such insurance.

277 This contract covers not only the property now owned but also property hereafter acquired; and all hereafter acquired property, including the proceeds of life insurance, whether standing in the name of said individuals or either of them, or in the firm name, is understood to be firm property, unless there be an express agreement to the contrary—(the only reservation is a certain policy on the life of Robert J. Fleming, payable to his wife, Emma D. Fleming).

The prayer of the plaintiff is that decree be entered construing said contracts to have no binding force or effect on plaintiff; decreeing that as to her Charles Fleming died intestate; decreeing that all of the property now held by the defendants, including all the assets of Fleming Brothers, Incorporated, represented by the corporate stock which is a part of the property of said defendant partnership, be held, in so far as the interest of this plaintiff is concerned, in trust for her; decreeing that the amount of her interest under the statutes of the State of Iowa, as the surviving widow of Charles Fleming, deceased, be fixed and determined by the Court and impressed in that amount upon said property in the hands of the defendants. It is further prayed that she be decreed such other, further and different equitable relief as to the court may seem just in the premises, and for her costs.

The defendants pray that plaintiff's Petition be dismissed and that they have judgment against her for the costs of this proceeding.

The cause was submitted to the Honorable Charles A. Dudley, Judge of said District Court. On or about April 14, 1917, he handed down a written opinion which announces substantially the following conclusions:

1. That the relationship existing between the four brothers at the time of the death of Charles was a partnership. And as there
278 was no agreement as to what the interest of each partner should be in the partnership property, the presumption is their interests were equal—wherefore, Charles, at the time of his death, was the owner of one-fourth of the partnership property.

2. That the agreement of January 17, 1911, was in effect a will under the laws of Iowa and, therefore, did not operate to dispose of the interest which Charles owned in the firm at the time of his death—and that in consequence of the foregoing findings the plaintiff, as surviving widow of Charles Fleming, is entitled to an accounting to the extent of one-half of an undivided one-fourth interest in the partnership assets.

The decree incorporated these findings, and added that it was ordered, adjudged and decreed that the said three defendants proceed with reasonable dispatch to sell and dispose of sufficient of the aforesaid co-partnership property to pay all the indebtedness thereof, and thereupon transfer and deliver to the administrator of the estate of Charles Fleming, deceased, one-fourth of the residue of said property to be distributed by him according to law; and the costs were taxed to said three defendants.

Thereupon, the said defendants duly perfected an appeal from said decree and said erroneous rulings of the said District Court to the Supreme Court of Iowa. In that Court they presented the following propositions and points in accordance with the rules of said Supreme Court, and to the end that a reversal of the action in the trial court might be had and done by the said Supreme Court.

The said propositions and points are set forth on the first sheets of the stipulated record, of which this paper is a part, to-wit on the eighty third to the eighty seventh sheet, both inclusive, on sheets one hundred to one hundred and six, both inclusive, on sheets one hundred and twelve to one hundred and fifteen, both inclusive, and on sheets one hundred and sixteen and one hundred and seventeen.

279 The Supreme Court of Iowa, notwithstanding, gave its final judgment overruling the third petition for rehearing filed by these defendants and appellants. It took this action on the 23rd day of December, A. D. 1922, and on that day affirmed in all respects the action of the said District Court—all of which matters appear in the record and proceedings of the above entitled suit and cause in said Supreme Court of Iowa.

The petitioners aver and claim that the said action of the Supreme Court of Iowa in affirming the said action and decree of said District Court was manifest error.

Wherefore, your petitioners pray for the allowance of a Writ of Error to take said proceedings to the Supreme Court of the United States for the determination of the last named Court; and they pray for such other process as may cause the action of the said Supreme Court of Iowa to be corrected by the Supreme Court of the United States.

Albert B. Cummins, Clinton L. Nourse, and
William E. Miller, Attorneys for De-
fendants and Appellants.

Upon consideration of the above Petition it is on this 15th day of December A. D. 1922, and hereby ordered that a Writ of Error be and hereby is allowed as prayed in the foregoing Petition, to have

reviewed by the Supreme Court of the United States the judgment hereinbefore entered in the above entitled cause, upon the petitioner giving bond according to law in the sum of one thousand Dollars, which bond shall operate as a supersedeas bond.

Truman S. Stevens, Chief Justice of the
Supreme Court of Iowa.

280

[File endorsement omitted]

WRIT OF ERROR

[Filed Dec. 16, 1922]

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Supreme Court of Iowa, being the highest court of law or equity of the said State in which a decision could be had in said suit between Anna B. Fleming, Plaintiff, Appellee and Defendant in Error, herein, and Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, Defendants, Appellants and Plaintiffs in Error herein, wherein was drawn a question of right or privilege set up and claimed under the Constitution of the United States and the decision of said Supreme Court of Iowa was against the rights and privileges as and so set up and claimed, and wherein was drawn in question whether the decision of the district court of Iowa and the said decision of the Supreme Court of Iowa, affirming said decision and decree of the District Court, was repugnant and violative of the Constitution of the United States, and the decision was that there was no repugnancy or violation of the constitution—a manifest error hath happened to the great damage of the said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John a Fleming, Administrator of the estate of Charles Fleming, deceased, as by their complaint appears:

We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you if judgment be therein given that then under your seal, distinctly and openly, you send
281 the records and proceedings aforesaid with all information concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty (30) days from this date (unless that period be duly enlarged after signing the citation therein), in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to

correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this fifteenth day of December, A. D. Nineteen Hundred and Twenty-two.

N. F. Reed, Clerk District Court of the United States for the Southern District of Iowa. [Seal of the U. S. District Court. Southern District of Iowa.]
Attest: Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa.

282

[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

PRAYER FOR REVERSAL

[Filed Dec. 16, 1922]

To the Honorable the Supreme Court of the United States:

And now come the said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, impleaded as a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, the Plaintiffs in Error herein, and pray for a reversal of the judgment of the Supreme Court of Iowa, in an action brought by Anna B. Fleming, Plaintiff and Appellee, against Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, and in which action a judgment was rendered by the Supreme Court of Iowa on the 23rd day of September, A. D. 1922, and entered in the office of the Clerk of the Supreme Court of Iowa on said date, which judgment so entered affirmed the action of the District Court of Iowa, in and for Polk County, earlier entered, and which said judgment and decree of said District Court and said affirming judgment by the Supreme Court of Iowa decreed, adjudged and held that these aforesaid plaintiffs in error, either or all of them, could not enforce the certain three writings executed and entered into by the said Robert J. Fleming.

283 John A. Fleming, Stanhope Fleming and Charles Fleming: decreeing and adjudging further that notwithstanding said three writings (which constituted an agreement that the survivor of the said four Flemings should have full title to any and all property acquired by the said four Flemings, and in existence at a time when some one of these four were the sole survivors), had no validity

against the claim of dower asserted by Anna B. Fleming, plaintiff, on account of her being the wife of the said Charles Fleming, while said Fleming was living. The said three writings were executed respectively December 14, A. D. 1896, January 23, A. D. 1897, and January 17, A. D. 1911, and are the three writings set forth in *hinc verbæ* in the Petition for Writ of Error filed in this cause.

Albert B. Cummins, Clinton L. Nourse, and
William E. Miller, Attorneys for De-
fendants, Appellants and Petitioners.

284

[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

ASSIGNMENT OF ERRORS

[Filed Dec. 16, 1922]

Come now the above named Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, impleaded as a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, Appellants and Plaintiffs in Error, and in connection with their writ of error respectively submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Iowa, in the above entitled cause and matter, there is manifest error as hereinafter set out: And said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, Defendants, Appellants and Plaintiffs in Error, make and file this their Assignment of Errors:

1. The court erred in attempting to construe the three writing set forth in petition for writ of error, because each of them are so plain as to need no construction.

285 2. After having properly declared that the three writings together constituted the contract, and should be construed together as one contract, and that the meaning of the one contract was to be determined from construing the three together—it was error for the Supreme Court of Iowa to rule further that the third writing was of more controlling force on the argument that same was the last expression of the parties as to the subject matter of the three contracts.

3. Erred in declining and refusing to hold that the existence or non-existence of a partnership was irrelevant and immaterial, and erred in holding that a partnership and its members could not make a valid contract with the incidents of survivorship.

4. The Court erred in holding that the three writings, singly or together, were a contract of partnership, or created a partnership, or

the relation of partners, or any relationship from which the ordinary incidents or consequences of partnership resulted; and it erred in treating the joint property of the four Flemings as mere partnership property.

5. Erred in holding that the contracts were in terms partnership contracts, and were not contracts creating in lawful effect a joint tenancy with provision for survivorship, and excluding inheritance and dower rights.

6. The Court erred in holding there was here a partnership, because, among other things, the contract stipulates that each might draw at will without accounting to any of the others, because it is undisputed that then there was no stipulation that either should bear losses; and because no account was made, kept or contemplated of the relative or actual earnings or contribution of any one of the brothers to the joint estate or income.

286 7. Erred in holding it was proved that the parties understood their relationship to be that of partners and not of joint tenants, and in so holding, despite the undisputed testimony to the contrary, that all parties understood the agreement was not one of partnership, that said agreements, singly or together, and the conduct of the parties, evidenced a partnership of the ordinary sort.

8. Erred in holding that even if the members of a partnership created a joint tenancy and entered into contract with attributes of survivorship that yet each partner is vested with an estate that survives his death.

9. Erred in holding that there ever was in existence a partnership relation which worked that Charles Fleming was or remained the possessor, at his death, of an inheritable estate.

10. The court erred in failing and refusing to hold that the plaintiff widow knew of and acquiesced in and profited by the joint arrangement evidenced by the contracts at bar, and so acquiesced in and profited by for many years, and therefore, erred in failing and refusing to hold that plaintiff should be held to be bound as by an estoppel.

11. The Court erred in holding that the venture covered by these contracts was a commercial enterprise.

12. The Court erred in holding that plaintiff had dower rights on the argument that the venture covered by these contracts was a commercial enterprise.

13. The Court erred in holding that it was material, if true, that the venture covered by these writings was a commercial enterprise.

287 14. After properly ruling that mere nomenclature was not controlling it was error to rule also that the nonuse of the word "partnership" in the first two writings was of no consequence while its use in the third writing was of great if not controlling importance.

15. The Court erred in holding it to be material that the contracts at bar do not purport "in terms to create a common law joint tenancy."

16. The Court erred in holding that contracts such as these at

bar are not effective unless they in terms purport to create a common law joint tenancy.

17. The Court erred in holding that there can be no joint tenancy in property other than land.

18. The Court not only erred in holding that there could be no joint tenancy in property other than land, but in so doing overruled and departed from its holding in *Baker v. Syfritt*, 147 Iowa, 49, which case was decided prior to the making of the last of the three contracts in controversy, and in which a contract of survivorship was enforced both as to lands and personal property.

19. The Court erred in holding it to be material that "the alleged joint tenancy was not created by the act of any third party, but was created, if at all, solely by the contract of the alleged tenants."

20. The Court erred in holding that the contracts at bar did not effectually create a joint tenancy with incident of survivorship on the reasoning that the alleged joint tenancy was not created, by any act of any third party, but was created, if at all, solely by the contract of the alleged tenants—it being error to hold that there could not be joint tenancy and a valid contract of survivorship merely because the contract creating these was the contract of the alleged tenants.

21. The Court erred in holding erroneously that the theory of joint tenancy in a common law sense was not available to these appellants.

22. Erred in refusing and declining to hold that here was a contract creating what is essentially a joint tenancy by mere operation of law, especially as it has an expressed agreement that the survivor should take what was left.

23. The Court erred in holding that it was material that joint tenancy statutes were not now in as much favor as they were in earlier times.

24. The Court erred in holding it to be material that there was a change made by creating a corporation, and in holding that this affected any property rights theretofore existing, and so erred because plaintiff has declared in the record that the said corporation and the said shares were and remained the property of the alleged partnership.

25. After holding that the creation of the corporation and the issuing and dealing with the shares as was done was nothing but a change of form, the court erred in dealing with said creation and said issuing and dealing as though it was more than a change of form and was operative to give to each of the four an inheritable estate to which dower right could attach.

26. Erred after holding mere form would not control the court, that the mere formality of transferring stock in blank, which stock was covered by an express contract of survivorship, was in some way material, so that plaintiff's right of dower could attach. And this, though under the contract said stock, if it represented or was anything, merely took the place of the property belonging to the joint venture.

27. Erred in holding that though in form Charles Fleming trans-

ferred all his property to the corporation, he was the joint creator of that corporation and owned one-fourth thereof.

28. Erred in holding it to be material, if true, that Charles transferred all his property to the corporation in form alone and in holding it to be material, if true, that he was the joint creator of the corporation, and owned one-fourth thereof.

29. Erred in holding it to be material, if true, that though each of the parties transferred his stock, in severalty to all of them jointly, and thereby changed the form of his property right, he still owned the substance thereof.

30. The Court erred in holding it to be material that if the four brothers had at any time attempted a partition as between themselves, each much have received his one-fourth of the corporate property or stock.

31. The Court erred in holding it to be material that the benefits of said property still accrued to the same party, and that no fifth party ever acquired an interest in said property or an incumbrance thereon.

32. The Court erred in holding that Charles Fleming did not transfer his personal property, on the asserted ground that there was no transferee.

33. The court erred in holding it to be material that there was no transferee and no taker of delivery, and in holding it to be material, if true, that the four brothers all put their shares into a common receptacle, and locked them in a safe to await eventualities.

290 34. The court erred in holding it to be material that it cannot be told to whom Charles Fleming endorsed nor to whom he made delivery of the stock in said corporation.

35. The Court erred in holding that the deposit of said stock by each of the four, and the assignment of each in blank did not amount at the time to a constructive delivery to the joint tenancy.

36. The Court erred in holding it to be material, if true, that the rights of these appellants are affected by a failure of each to deliver and vest title in each of the others.

37. The Court erred in holding it to be material, if true, that there was no disseizen from one in favor of either of the others.

38. In holding that a disseizen or a delivery or a vesting from each to the other was essential, the court departed from its holding in *Baker vs. Syfritt*, 147 Iowa, 49.

39. The Court erred after holding that there was in truth no delivery of the corporation stock, that yet the creation and locking up of said stock in a box in some way operated to create a property in Charles Fleming to which dower could attach.

40. The Court erred in holding it to be material that there was no delivery of the shares, for if that be true what was done amounted to nothing, and the deed to the property remained as it was before the attempted transfer of said corporation stock.

41. The Court erred in its attitude with reference to said stock, because its argument on that point would make every survivorship

contract void. For in that in no survivorship contract is every item of property at all times under the control and in the possession of one partner or joint venturer as much as in that of the other. Nor a moment when one party did not have equally full access to everything belonging to the joint venture, and the benefits always did still accrue to all contracting parties.

42. The Court erred in holding it to be material that the property in question at all times remained in the dominion of the said parties, to-wit: the said four brothers and the said three brothers after the decease of Charles.

43. The Court erred in holding it to be material that, in a sense, what was done was a transfer from one signer to the other, for such assignment merely accreted the fund upon which the survivorship contract was to operate.

44. Erred in holding that no estate in the tangible property which had accumulated as a result of the business enterprise was by express provision vested in any person, persons, or entity.

45. Erred in holding it to be material, if true, that no estate in the tangible property that accumulated as a result of the business enterprise was by express provisions vested in any person, persons or entity.

46. Erred in holding it could not have been the thought of the Fleming Brothers that the title to the property acquired as it came in existence should none of it vest in anyone, except that portion of the property which was taken and appropriated by each to his immediate needs.

47. Erred in holding it to be material, if true, that the Fleming Brothers could not have thought that the only property acquired as it came into existence which should vest in anyone was that portion taken and appropriated by each to his immediate needs.

48. Erred in holding that for the purpose of this suit it must be assumed that title to property that can be the subject of ownership vests in someone, whether it be an individual, individuals or a legal entity.

49. Erred in holding it to be material, if true, that for the purpose of this suit title to property that can be the subject of ownership must be assumed to vest in someone whether it be an individual, individuals or a legal entity.

50. It erred in ignoring the law of contingent remainders under which there may be a vesting for some purposes in a class, though, at the time when such remainder is created, no one can tell who, if anyone, would be in the class when the time for distribution came.

51. Erred in not holding that the vesting under the contracts at bar was not within the rule that governs the vesting of title in gifts inter vivos and gifts causa mortis.

52. The Court erred in holding that all there was here was an inchoate vesting, with provision that someone ultimately have full title.

53. The Court erred in holding that because in the lifetime of all but the last survivor there was nothing but an inchoate title in

either, that, therefore, if one died before the others, he died seized of anything to which a dower right could attach.

293 54. The Court departed from its holding in *Albright vs.*

Hannah, 103 Iowa, 102, wherein it was ruled that for the purpose of sustaining survivorship contracts that may be deemed a present transfer of the fee which for some purposes is not deemed to be such transfer.

55. Erred in holding that under any statute of the State of Iowa any of the property held or accumulated ever so vested in any one of the signers as that on his decease, despite his contract, Charles died so seized of anything as that dower could attach.

56. The Court erred in holding that there could be a dower right interest in favor of a surviving spouse where the other spouse was during the marriage merely a joint tenant in both real and personal property.

57. Erred in holding that at the time of his decease Charles had such an interest in said property that plaintiff is entitled to a distributive share therein.

58. The Court erred in holding that Charles Fleming was at the time of his decease seized of any property, or of any property to which dower could attach; erred in holding that at said time anything existed up on which any dower right of plaintiff could attach.

59. Since the writings declare that they are made to fix and determine the interest of each and of all the signers; that each signer shall have only such share as shall be actually received by him upon order of each with the consent of the others, and that such sums so paid or received shall fully represent the share and interest of each signer as long as they remain associated together, or thereafter; and since they provide that what each has drawn to the time of his death shall constitute his sole interest and the sole interest of his estate

294 and that neither party has or can have any property rights or money interest in said business, except so defined in the writings, and that on the death or withdrawal of any signer all his interest in the business or its assets shall thereupon cease and determine and the property owned by the entity denominated partnership shall be and become the property of the survivors—and the Court erred in holding that either of the signers had any interest in the business or assets thereof beyond the amount that up to the time of his death he had drawn from the business or from its income or profits—and erred in holding, contrary to the said express provisions, and despite that the holding is entirely unsupported by the evidence, that said provisions were intended merely to cover the immediate needs of each signer, that their evident purpose was to forestall extravagance in order to conserve the interest and profits against extravagance and thereby to promote the continuance of the business without corruption.

60. Since the writings declare they are made to fix and determine the interest of each and of all the signers, that each signer shall have only such share as shall be actually received by him, that the sum paid or received shall fully represent the share and interest of each signer at all times while the signers remain associated or there-

after; since they provide that what each has drawn to the time of his death constitutes his sole interest and the sole interest of his estate, that no accounting shall be made by or required of either party, and that neither has or can have any property rights or money interest in said business, except as above defined, and

295 that on the death or withdrawal of any signer, all of his interest in said business or its assets shall thereupon cease and determine and the property owned by the entity denominated partnership shall be and become the property of the surviving signers,—the court erred in holding that if either signer died before any of the others said property would not become the property of the survivor or survivors, but remain that of the predeceasing signer so that dower right on part of his spouse would attach; and erred in holding that either signer ever had greater interest than what he had drawn up to his death, for as under the contract provisions as the last survivor took all, the one who died first necessarily could not have a greater interest than what he had drawn in his lifetime.

61. Erred in first holding that while the obligations of each signer were of necessity suspended as to him while he lived, that yet Charles Fleming had an estate of which he died seized; for because of his dying as early as he did, the suspended obligation ceased at said death to be an obligation to him.

62. After having held that the only thing to be determined was the proper construction of said three writings, the court erred in construing said writings to be no bar to an assertion of dower rights on part of plaintiff.

63. After having correctly held that the sole issue was whether Charles Fleming died seized of any interest in the property held by these defendants or some of them, the court erred in holding that Charles died seized of any interest in such property or of any interest therein in which the dower rights of plaintiff could attach.

64. After having held correctly that the joint tenancy
296 when created vests in each of the tenants a common right in the property which does not survive his death unless he becomes the last survivor of all the tenants and that then for the first time does that which before consisted in a practical sense of a life estate in the property become vested as an estate of inheritance—it erred in declaring and holding that Charles Fleming at the time of his decease was seized of an inheritable estate or seized of anything to which dower right of plaintiff could attach.

65. After having held correctly that under such a contract as the one at bar there is rather a falling away of the tenant from the estate than the passing of the estate to others—the court erred in holding that Charles Fleming at the time of his death was seized of any estate whatsoever to which the dower rights of plaintiff could attach.

66. After having held correctly that in a legal sense the death of Charles did not transfer rights which he possessed in the property to the surviving tenants, that his death did not enlarge or change the estate of Charles and that his death terminated the interest in

the estate—the court erred in holding that at the time of his decease Charles was seized of any estate whatsoever or of any estate to which the dower interest of plaintiff could attach.

67. After correctly holding that if the joint tenant died without disposing of his share the title to the thing which is the subject of joint tenancy remains in the survivor or survivors, free from the charge or moiety of one who dies—the court erred in holding that at the time of his decease Charles Fleming was seized of any estate whatever of an estate to which the dower right of plaintiff could attach.

297 68. Erred in holding that the Iowa statutes made dower rights impregnable, and that therefore dower attached, even if as a result of a survivorship contract the spouse dying first was seized of nothing at the time of his decease.

69. The Court erred in holding it to be material that “the theory of joint tenancy in a common law sense is not available to carry the appellants any further than the terms of their contract carry them.”

70. After having held correctly that, “in the last analysis, therefore, we have before us a contract—nothing more, nothing less, and being a contract, it may be enforced as such unless there be some legal impediment thereto”—the court erred in holding that the contract at bar did not create a joint tenancy with the incident of survivorship, and erred in holding that despite such contract Charles Fleming died seized of some estate, or of an estate to which the dower rights of plaintiff could attach.

71. After correctly holding that the appellants have at least such rights as the terms of their contract give, the court erred in denying to them the relief stipulated for and all rights given by the terms of the contract.

72. Erred in holding that while, as must be true, such contracts as the one at bar are valid and effective as an abstraction, they yet were ineffective to bar dower rights of plaintiff.

73. Erred in holding that the survivorship contract was not a present disposition made in the lifetime.

74. The court erred in holding that when one joint tenant conveys his individual property in conformity with a contract of survivorship, that yet right of dower attached to the property so transferred.

298 75. After correctly holding that each joint tenant during life may dispose of his share by the usual modes of conveyance, the court erred in holding that Charles had not so disposed of his said share by means of the contracts at bar, and in holding that at the time of his death he was seized of any estate to which the dower right of plaintiff could attach.

76. The Court erred in holding that what was done here was a testamentary disposition, and in holding that what was done was such disposition of the property in which the deceased brother was in his life time jointly interested.

77. Erred in holding that here is a case wherein a husband was attempting to take from his wife any share in his estate accumulated

in his lifetime and left at his death, and in holding that there was any attempt to do such taking by any testamentary disposition.

78. The Court erred in holding that this was a testamentary disposition. For Charles Fleming made no transfer at all, much less one to become effective at the time of his death. He merely made a disposition in his life-time to the effect that if he died before said others did, he should never have any title.

79. The Court erred in holding that this was a testamentary disposition. For there was no agreement that the joint property should be vested in some one other than Charles at whatever time Charles died. On the contrary, it was an agreement that title should not vest fully in any one until three of the four had died; and no limitation upon disposition by said last survivor.

299 80. Having held that in joint tenancy there was no title in any tenant, and that on his death there was an exclusion or falling away from title, the court erred in holding that, yet, there was here a testamentary disposition, and an inheritable estate of which Charles Fleming died seized.

81. Erred in holding that these contracts were not effective for being, instead of an arrangement for the payment of the debts of a decedent a mere scheme to absorb the assets of his estate.

82. Erred in holding, first, that the writings at bar constituted a contract by Charles Fleming to make a will, and, second, in thereupon holding that if said writings were such contract they would be the equivalent of a will and thus an attempt by will to affect dower rights and the distributive share of plaintiff.

83. Erred in assuming that the writing at bar constituted a contract to make a will, and erred in proceeding from that erroneous assumption to hold further that a contract to make a will is the same as a will and that therefore here was an attempt to affect the distributive share and dower rights of plaintiff by means of a will.

84. Erred in assuming that the writings at bar constituted a contract on part of Charles Fleming to make a will, thereupon holding that such a contract could be enforced to the same extent as though Charles instead had made a will; and erred in holding upon these unfounded assumptions that the writings at bar constituted an effort to affect the dower rights or distributive share of plaintiff by means of a will.

300 85. The Court erred in holding, because the statutes of Iowa do not permit a will to diminish or cut off dower rights, that, therefore, the transaction here was a contract to make a will; holding that such contract was the equivalent of making a will and that, therefore, there was here nothing more than an ineffectual attempt to cut off dower by means of a will.

86. Erred in holding it to be material that Section 3376 of the Code of 1897 provides that a survivor's share can not be affected by any will of the spouse unless a stated consent is given in stated manner, within a stated time.

87. Erred in holding that the writings at bar were an attempt to deprive the plaintiff widow of her distributive share by means of a will on part of Charles Fleming.

88. The Court erred in holding that there was a partial failure of consideration.

89. The Court erred in holding under the pleadings in this suit that there was the right to pass on the question of whether there had been a partial failure of consideration, because under the issues and pleadings it is immaterial if true that there was a partial failure of consideration.

90. The Court erred in holding that these contracts are not sufficiently supported by a consideration, on the argument that said contracts could not possibly be performed, at least wholly.

301 91. The Court erred in holding that the alleged existence of the partnership prevented a holding as joint tenants such as cut off inheritable interest and in so doing departed from its decisions to the contrary expressed in *Paige vs. Paige*, 71 Iowa, 318, and in so doing erred in the construction of Section 2923 of the Code of 1897, departing in the instant case from the contrary decision in said *Paige* case, which decision was made prior to the time at which the contracts at bar were made.

92. The Court erred in holding that there has ever at any time been, either in the statute law or decisions of the Supreme Court of Iowa, anything forbidding the making of a survivorship arrangement between persons who in other respects were merely partners.

93. Section 2923 of the Code of 1897 was effective and in force prior to the time at which any of the contracts at bar were made, and has been in force ever since; and in holding in the instant case against the validity and effectiveness of said contracts the Court violated the provisions of that statute which reads that "conveyances to two or more in their own right create a tenancy in common unless a contrary intent is expressed," which said provision was construed by said Court in *Wood vs. Logue*, 167 Iowa, 441, to sanction and validate such contracts as the one at bar.

94. What is now Section 2923 of Code of 1897 has been in force from 1860 continually to this day. As construed in *Wood vs. Logue*, 167 Iowa, at 440, its provision that "conveyances to two or more in their own right create a tenancy in common unless a contrary intent is expressed," sanction and make valid such contracts as the one at bar—and the court erred in so disregarding the said statute and departing from its said construction as to hold in the instant suit that the contracts at bar are invalid and are no bar to an assertion of dower rights on part of plaintiff.

302 95. The Court erred in the instant case in construing Section 2923 of the Code of 1897, and in so erring departed from its decision in *Hoffman vs. Stiger*, 28 Iowa, 302, which last named decision was made prior to the time at which any of the contracts at bar were made.

96. The Court erred in departing in the instant case from the provisions of Section 2923 of the Code of 1897, which statute was in force at and before either of the contracts at bar were made and ever since, and in departing from the construction which said court had heretofore always given to said statute.

97. Erred in holding that there was any statute which took from

Charles Fleming the power to dispose of his personal property, with or without consideration, or in any manner that pleased him.

98. Erred in holding that while Charles Fleming might dispose of his personal property in any way that pleased him, he could not dispose of same by such survivorship arrangement as he did become a party to.

99. The Court erred in departing from its former decisions made before these contracts were made and to the effect that as to personal property either spouse might make such disposition in his life-time as pleased him, and with or without consideration.

100. The Court erred in departing from the rule laid down by it in such cases as *Haines vs. Harris*, 33 Iowa, 516; *Caruth's case*, 128 Iowa, at 123, and *Stahl vs. Brown*, 72 Iowa, 720, wherein it is expressly held that the personal estate vests in the administrator during administration, and that "the heirs take no title to or ownership of the personal property of the estate while it is subject to administration; but it descends to the administrator upon his appointment,"—and which said decisions were all made at and before the making of either of the contracts at bar.

101. The Court erred in departing from its holding in *Samson vs. Samson*, 67 Iowa, 253, wherein it is expressly held that while Section 2436 of the Code of 1873 gives to the surviving widow a distributive share in the personal property of which her husband dies seized, that during his life time she had no inchoate right in such property, and he may make such disposition of it during his life-time as he sees fit; that if he sells it or makes any other disposition of it by which he is divested of the ownership, the wife has no claim upon it after his death, and that the law has placed no restriction or limitation on the power of the husband to make such disposition of his personal property during his life time as he may elect.

102. The Court erred in holding that either or both of the following statutes of Iowa had any application to the suit and issues at bar. Section 3362 Iowa Code, of 1897—"The personal property of the deceased not necessary for the payment of debts, nor otherwise disposed of, shall be distributed to the same persons and in the same proportions as though it were real estate.

Section 3376 of the Same Code.—"The survivor's share cannot be affected by any will of the spouse unless consent thereto be given within six months after a copy thereof has been served upon the survivor by the other parties interested in the estate, and notice that such survivor is required to elect whether consent thereto will be given, which consent when given shall be in open court or by a writing filed therein, which shall be entered on the proper records thereof; but if at the expiration of six months no such election has been made, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder.

103. The Court erred in holding that in the decision at bar it had no purpose to overrule and did not overrule prior decisions of the Supreme Court of Iowa.

104. In the instant case the Court erroneously disregarded statutes

of Iowa in force and decisions of said Court rendered before said contracts were made.

105. Erred in holding that any statute provisions of the State of Iowa gave plaintiff any dower right, here—and holding that said sections of the Iowa statute, either or both together, have or had the effect that said contracts were no bar to dower right on part of plaintiff.

106. The Court erred in deciding that despite these contracts dower right attached, because in so holding it departed from earlier holdings by the same court to the contrary, which holdings were earlier than the making of the last contract.

107. The Court erred in departing from its former decisions and constructions of the Iowa statute made at and before the execution of the contracts at bar, all to the effect that such contracts as the one at bar were lawful, and that on the death of one party thereto the property, both real and personal, passed to the survivors and so on until the last survivor was reached.

108. The Court erred in departing from its own decision and its construction of the Iowa statute, which deciding and construing was had at and before when the contracts at bar were made, and which decisions and constructions were that such contracts were valid as to all the four signers thereof and all other persons including the plaintiff herein; which said departure was from its decision, for one in *Baker vs. Syfritt*, 147 Ia. 49.

305 109. Erred in holding that the decision of the Supreme Court of Iowa in *Stewart vs. Todd*, 190 Iowa, 283, is not applicable to and ought not to rule the cause at bar.

110. The Court erred in that its decision is but an oscillation; is a departure from its decisions at and before the contracts at bar were made and a like departure from its decision since the instant case was decided by it.—It having been the decision of the Court both before and since the contracts at bar were made that such contracts operated to create a joint tenancy with the incident of survivorship, and that when such contracts existed there was nothing to which dower right could attach.

111. Erred in that its said judgment and decision impairs the obligation of said contracts in violation of Article 1, Section 1 of the Constitution of the State of Iowa.

112. The court erred in that its judgment and decision impairs the obligation of the contracts in controversy in violation of Article 1, Section 10 of the Constitution of the United States.

113. Erred in that its said judgment and decision deprives these petitioners and defendants of property without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

114. Erred in overruling the contention by defendants supported by the citation of *Muehlker vs. Railway*, 197 U. S. 544, to-wit: that the decision and decree violate the contract clause of the constitution of the United States, Article 1, Sec. 10, in that the court holds that a contract valid when made, going into effect instantaneously as an operating agreement, and providing for survivorship, and what is

essentially a joint tenancy is void because of a newly discovered public policy, newly and now for the first time declared, and
 306 which is contrary to the former decisions of said court, and of the Supreme of the United States.

115. Erred in overruling the objection of defendants that the decree and decision deprived them of property without due process of law, in and for that the interest which the decree and decision create in the plaintiff, namely: about one-eighth of the joint estate, is to be and must be carved out of the estate which, pursuant to valid contracts (under law heretofore existing) vested in the defendants absolutely as against the plaintiff upon the death of Charles Fleming. This, in violation of the law of this State as settled in the authorities and statutes hereinbefore cited, and in contravention of the Constitution of the United States, 14th Amendment, Section 1.

116. Erred in that the said judgment and decisions made a change from constructions of statutes of the State of Iowa and from decisions all made before the contracts at bar were entered into, and making such change in decision retroactive and to destroy the validity of the contracts at bar though under such earlier constructions and decisions, said contracts were valid—all in violation of and contrary to the Muehlker case, 197 U. S. 544; Gelpke's case, Wall 194; Douglas Case, 101 U. S. 677; Loeb's case, 21 Sup. Ct. Rep. at 182; Taylor's case, 105 U. S. 72; De Bolt's case, 16 How. 425; Anderson's case, 6 Sup. Ct. Rep. 413; Lamson's case, 76 U. S. 485, 486; Burgess' case, 107 U. S. 33, 34; Havemeyer's case, 3 Wall 294; Mitchell's case, 4 Wall, 270; Rigg's case, 6 Wall, 106; Lee County's case, 7 Wall, 181; Chicago vs. Sheldon, 9 Wall 50; Olcott's case, 16 Wall, 678; Talcott's case, 86 U. S. at 678; Green's case, 3 Sup. Ct. Rep. 69; Butz's case, 75 U. S. 575; Aetna Co.'s case, 11 Sup. Ct. Rep 215, 217; Groves' case, 15 Peters, 499; German Bank's case, 9 Sup. Ct. Rep. 163; Rohan's case, 46 U. S. at 38, 39;
 307 Milwaukee Company's case, 40 Sup. Ct. Rep. 309; Antonio's case, 22 Sup. Ct. Rep. 95, 96; Trannenberger's case, 35 Sup. Ct. Rep. at 680; Willoughby's case, 235 U. S. 50; Tampa's case, 199 U. S. 243.

117. The Court erred in disregarding the numerous cases in the Supreme Court of the United States to the effect that even if the court of last resort is convinced it should overrule its former decisions, it must not make such reversal of opinion retroactive so as to affect contracts made before such change of opinion.

118. The Court erred in taking the position that it had not made such change in decision merely because it had overruled no case *eo nomine*—it being sufficient to invoke the Federal jurisdiction that said court had made, announced or approved some rule, doctrine or principle which at the time when the contracts were made sanctioned and validated same, and after such contracts were made had departed from or revoked such rule, doctrine, or principle, and thereby declared such contracts to be invalid and ineffective.

119. The Court erred in holding these contracts to be ineffective, despite the fact that when made, there was no Iowa decision in-

validating such contracts, and the law of the land then sanctioned them.

120. The Court erred in not holding that the widow knew of and acquiesced in and profited by the joint arrangement evidenced by those contracts, for many years, and in not holding that she should be held to be bound as by an estoppel.

308 The undersigned, therefore, pray that said judgment and decree of the Supreme Court of the State of Iowa may be reversed and that they may have such other relief as may be proper and just.

Albert B. Cummins, Clinton L. Nourse, and
William E. Miller, Attorneys for De-
fendants, Appellants, and Plaintiffs in
Error.

The above Assignment of Errors was presented to me with the petition for Writ of Error. The Clerk of the Supreme Court of the State of Iowa is directed to file the same as one of the papers in this proceeding, to procure Writ of Error.

Truman S. Stevens, Chief Justice of the Su-
preme Court of the State of Iowa.

309

[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

ORDER FOR TRANSCRIPT

[Filed Dec. 16, 1922]

Petitioners in error above named having obtained allowance of a writ of error to the Supreme Court of the United States, having given approved bond and having filed their assignment of errors, it is further ordered that the Clerk of this court shall forthwith certify the record, proceedings and orders made had or entered by certifying the paper which the parties to this cause have by their attorneys, stipulated and agreed is such record, proceedings and orders, and shall deliver said paper so certified to the attorneys of said petitioners for transmission to the Clerk of the Supreme Court of the United States—such certifying to be at the expense of said petitioners.

Dated December 15th A. D. 1922.

Truman S. Stevens, Chief Justice of the Su-
preme Court of the State of Iowa.

[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

ORDER GRANTING WRIT OF ERROR

[Filed Dec. 16, 1922]

Upon reading the petition and assignments of error of the above named Petitioners in Error, plaintiff and appellants, praying for the allowance of a Writ of Error from the Supreme Court of the United States to this court to review the judgment of this court heretofore rendered to-wit, on December 16, 1919, on December 20, 1920, on September 20, 1921, and on September 23, 1922, and it appearing from said petition and the record in this cause that a proper cause for the allowance of said writ is presented, it is ordered, that the same be, and is hereby allowed.

It is further considered, ordered and adjudged that the amount of security which the said plaintiff and appellee shall give and furnish upon said writ of error, be, and hereby is, fixed at (\$1,000) One Thousand Dollars, and that said security shall be by bond, conditioned according to law, and with sureties to be approved by the Chief Justice of the Supreme Court of the State of Iowa, and that upon the giving and approval of such bond, all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error in the Supreme Court of the United States.

Done this 15th day of December, A. D. 1922.

Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa.

[File endorsement omitted]

Certified Copy

In the Supreme Court of Iowa

[Title omitted]

BOND ON WRIT OF ERROR

[Filed Dec. 16, 1922]

Know all men by these presents, That We, Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Bros., and John A. Fleming, Administrator of the Estate of Charles Fleming, deceased, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto Anna B. Fleming, the plain-

tiff and appellee in the above entitled cause in the sum of One Thousand no/100 Dollars, lawful money of the United States of America, to payment of which well and truly to be made, the said principals and the said surety bind themselves and each of their successors, representatives and assigns, jointly and severally, firmly by these presents:

The conditions of this bond are such that whereas, in the above entitled cause, the Supreme Court of Iowa rendered its opinion and judgment on, to-wit, December 16, A. D., 1919 affirming the judgment of the District Court of Polk County, Iowa, in said cause, which was wholly adverse to these appellants, and

312 Whereas, The Supreme Court of the State of Iowa rendered its further and supplemental opinion and decision on, to-wit, December 20, 1920, denying the appellants' petition for rehearing theretofore filed, argued and submitted in said cause and in said supplemental opinion and decision, adhering to its decision affirming the judgment of the District Court of Polk County, Iowa, in said cause, and

Whereas, The Supreme Court of the State of Iowa on, to-wit, September 28, 1921, rendered its supplemental opinion, modifying and affirming its two former opinions rendered and entered, as aforesaid, in said cause and in said last named supplemental opinion overruled in part the objections and exceptions of the appellants, as set forth in their second petition for rehearing which had been filed in said court and cause February 17, 1921, and duly submitted to said court, and

Whereas, Appellants, having on November 25, A. D., 1921 filed in said court and cause their third petition for rehearing and which was thereafter duly submitted to said Supreme Court of Iowa, and the same was on, to-wit, September 23, A. D., 1922, overruled by said court without the filing of an opinion and on said last mentioned day and date, judgment was entered by said Supreme Court of Iowa, *accordingly*, — an order that procedendo and execution issue in said cause against these appellants, and

Whereas, said order and judgment to the Supreme Court of Iowa, of September 23, A. D., 1922, is final and conclusive as to the legal rights and obligations existing between the appellants and appellees except as to mere matters of accounting in the courts of the state of Iowa.

313 And the appellants, Robert J. Fleming, et al., having obtained a writ of error and filed a copy thereof in the office of the Clerk of the Supreme Court of the State of Iowa, to reverse the judgments and decisions in the aforesaid suit and a citation direct to the said Anna B. Fleming, citing and admonishing her to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date thereof:

Now, therefore, The condition of the obligation is such, that if the said Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Bros., and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Bros., John A. A. Fleming, Administrator of the Estate of Charles Fleming, Principals. American Surety Company of New York, by F. H. Noble, Resident Vice-President. R. W. Clearman, Resident Asst. Secretary, Des Moines, Iowa. [Seal of the American Surety Company, of New York.]

314 I approve the foregoing bond and sureties, this 15 day of December, A. D. 1922.

Truman S. Stevens, Chief Justice of the Supreme Court of Iowa.

315 [File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

CITATION AND SERVICE

[Filed Dec. 16, 1922]

To said Anna B. Fleming, plaintiff, appellee and defendant in Error:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within ninety days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Iowa, in which writ and in the above entitled cause Robert J. Fleming, John A. Fleming, Stanhope Fleming, Fleming Brothers, a partnership, and John A. Fleming, Administrator of the estate of Charles Fleming, deceased, are the plaintiffs in error, and wherein you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error — should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa, this 15th day of December, A. D. Nineteen Hundred Twenty-two.

316 And it is hereby ordered and directed that the aforesaid plaintiffs in error lodge the record herein in the office of the Clerk of the Supreme Court of the United States by or before the fifteenth day of January, A. D. Nineteen Hundred and Twenty-three.

Truman S. Stevens, Chief Justice of the Supreme Court of the State of Iowa.

The undersigned, attorneys of record for the above named defendant in error, Anna B. Fleming, hereby admit that the above Citation was duly served on them on the 15th day of December, A. D. 1922, and they waive any further or different service thereof.

Parsons & Mills, J. M. Parsons, and Earl C. Mills, Attorneys for Anna B. Fleming,
Plaintiff, Appellee and Defendant in Error.

317

[File endorsement omitted]

In the Supreme Court of Iowa

[Title omitted]

Appeal from Polk District Court

CLERK'S CERTIFICATE

[Filed Dec. 16, 1922]

I, B. W. Garrett, Clerk of the Supreme Court of the State of Iowa, hereby certify that the words, figures and matters which precede this my certificate and to which said certificate is attached, are and comprise the record and proceedings made and had in the above entitled cause and in said Supreme Court as the same remains of record in my office, and I certify that said words, figures and matters are and comprise all and no more and no less than the parties to said cause have stipulated and agreed to be said records and proceedings. Preceding this certificate is found the original of said stipulation, and also the writ of error and the assignment of errors in the Supreme Court of the United States, and the Citation.

In witness whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Iowa, at Des Moines, Iowa, this 15 day of December, A. D. 1922.

B. W. Garrett, Clerk of the Supreme Court
of Iowa. [Seal of the Supreme Court
of Iowa.]

Endorsed on cover: File No. 29,305. Iowa Supreme Court. Term No. 175. Robert J. Fleming, John A. Fleming, Stanhope Fleming, et al., etc., et al., plaintiffs in error, vs. Anna B. Fleming. Filed December 22d, 1922. File No. 29,305.

FILED

JAN 11 1924

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 175.

ROBERT J. FLEMING, JOHN A. FLEMING, STAN-
HOPE FLEMING, ET AL., ETC., ET AL.,
PLAINTIFFS IN ERROR.

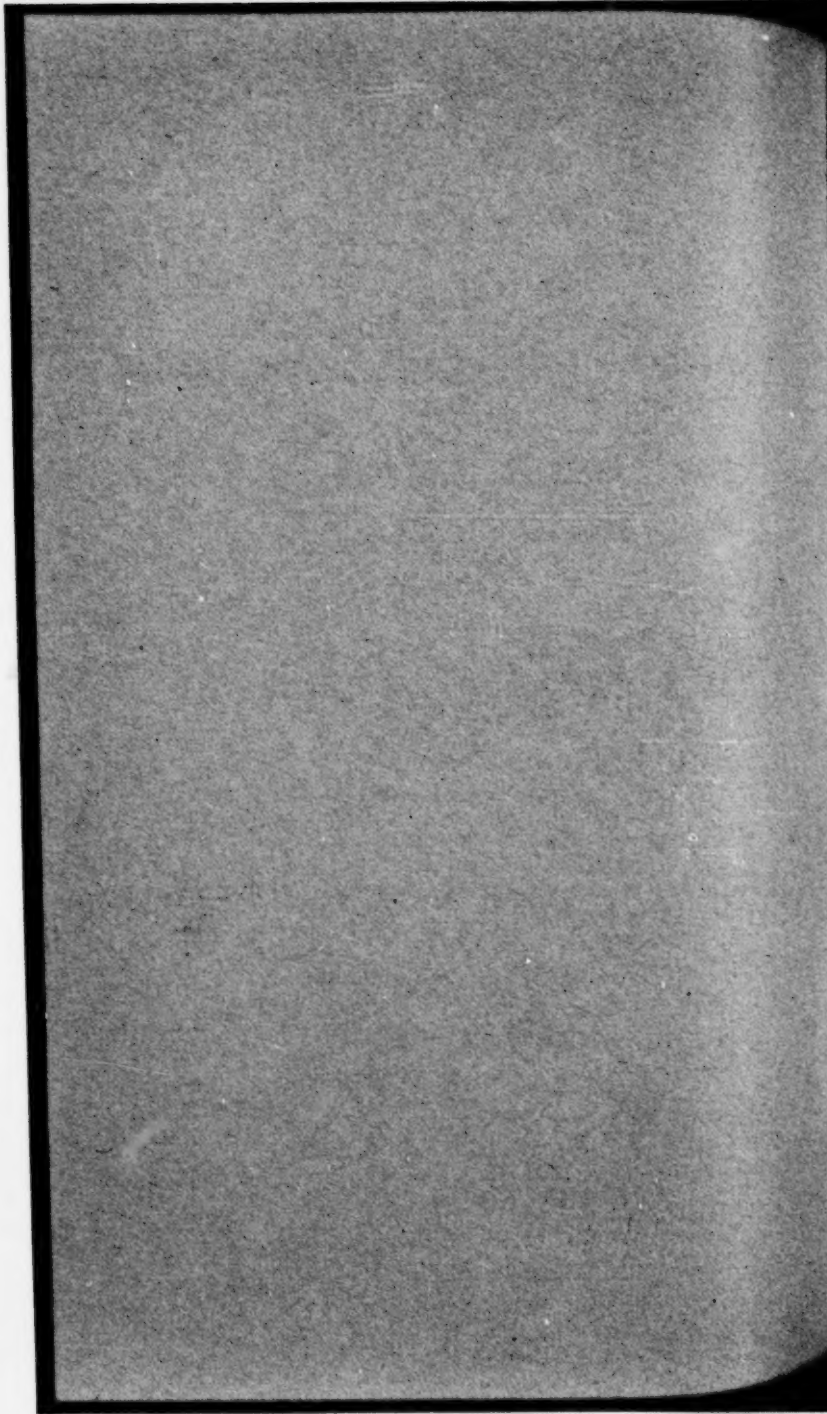
VS.

ANNA B. FLEMING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR APPELLANT.

B. I. SALINGER,
Attorney for Plaintiffs in Error.



INDEX.

	Page
Commercial Enterprise—Argument.	
Such enterprise not contracted about.....	7, 41, 42
Consideration—sufficient	5, 6, 43
Construction not binding here.	
See General Law; rule of law; Statutes.	
Contracts made.	
First	2, 3, 4, 5, 12, 16
Second	3, 4, 5, 12, 13, 16, 17
Third	3, 4, 5, 12, 13, 17
Contract rights desired.....	6, 20, 21, 22, 23
No law against when made.....	71, 107, 108
Departure, retroactive—makes Federal question.	
Analysis inferential, change by, suffices.....	83, 91, 92, 93, 94
Doctrine change suffices.....	85, 86, 92, 93
Earlier decision—made by several decisions.....	88, 90
Flat, need not be.....	77, 80, 88
Principle change in may suffice.....	83, 84, 85, 90
Res judicata, not basis.....	83, 84, 86, 87, 89, 91, 92
Departure in effect suffices.....	83
Though issues are different.....	91, 94
Though objections are different.....	82
Or subject matter	81, 91
Departure—makes Federal Jurisdiction.	
See jurisdiction.	
Federal question—is raised.....	108
Made by change operating retroactively.....	84
General law, only, is construed.....	105
Not binding here.	
Joint tenancy.	
Vesting full title—not required.....	6, 52

INDEX.

	Page
Jurisdiction—affected by change	9, 10, 24, 25, 80, 81
Constitution—violation of.	
Personal property disposition—interfered with...	94
Land.	
Joint tenancy and survivorship, not limited to.....	40, 41
Nomenclature, ineffective	55
Partnership.	
Can make survivorship contract.....	25, 26, 33
Existence of partnership, therefore immaterial.	
None existed, however.....	7, 8, 27, 28, 29, 30, 31
No profit and loss sharing.....	28, 29
Open field—see contract rights.	
Oscillation—not followed	9, 70, 74, 96, 97
Rule of law—defined	86, 87, 91, 93, 98, 99
Specification of Errors	11
Statement of Case	1
Statute change same as decision change	
.....	83, 87, 94, 95, 96, 98, 102, 103, 104
Construction of statute relates back to when it became effective	25, 46, 48, 57, 68, 98
Testamentary disposition—just imaginary	9, 32
Contract to make will—none made.....	34, 37, 38, 39
Was on consideration, at all events.....	34, 37
Survivorship contract, effective.	
Never abrogated expressly nor conduct.....	49
Exists—even if made by partners.....	7
Or though there is no joint tenancy.....	7
Can and did dispose of personalty only.....	9, 24, 39, 40, 46
Vesting or delivery not required.....	6, 52
Vesting and delivery.	
Not essential to survivorship contract.....	6, 52

TABLE OF CASES.

	Page
A.	
Aetna Life Co. case 138, 67; U. S.	66, 96, 100, 105
Albright, 103 Iowa, 101	37, 38, 56
American and Eng. Encyc. of Law, Vol. 17, 65	23, 36
Anderson, 63 N. J. Eq., 264	37
Anderson, 116 U. S., 356, 6 Sup. Ct. 413	65, 71, 72, 82
Apple v. Apple, 38 Tenn. 348	75, 78
Attorney General v. Treasurer (Mass.) 110 N. E.	40, 43, 75

B.	
Baker v. Syfritt, 147 Iowa 49	21, 40, 44, 47, 57, 74, 75, 78
Beach, Contracts, p. 487	38
Bishop, Cont. 516, 518	38
Black, Jud. Prec.	33
Blackstone, Com.	100, 105
2, Bouvier	100, 101, 103, 104, 105
Braun's case, 66 Federal at 479, 480	85, 94, 95, 97
Breyman v. Railway, 85 Fed. 583	92
Brown's case, 63 N. Y. 244	94
Burgess, 107 U. S. 33, 34	65, 66, 71, 107
Burgoon 121 Iowa 78	47
Butz v. City, 75 U. S. 575	66, 74, 106

C.	
Carruth, 128 Iowa, 123	46
Chicago v. Sheldon, 9 Wall. 50	65, 79, 95
City v. U. S., 103 Fed. 420	92
Code of Iowa, Sec. 2923	24, 25, 78, 99
Sec. 3629 and 2436	79
Cooley Constit. Limitations, 4th Ed. 474, 477	94
Copenhaver, 54 Fed. at 664	72, 82, 85
Cyc. pp. 901, 902, 1891, 1895, 1896	26

INDEX.

	Page
D.	
Davis v. Ballard (Ky.) (1 J. J. Marsh, 563, 576).....	100
Dillon Municipal Cor. Sec. 46.....	94
Douglas 101 U. S. 677.....	65, 66, 72, 73, 76, 77, 81, 83, 90, 93, 95, 96
Dubuque County v. R. R. 4, Greene 2.....	88
Duncan v. Magette, 25 Tex. 245, 253.....	100
Dunham v. Osborn, 1 Paige (N. Y.) 634.....	75, 78
E.	
Edwards v. Bibb, 54 Ala. 475.....	75, 78
Elliott, Contracts, p. 454, note 20.....	38
F.	
Fairfield's case, 100 U. S. 47.....	95
Fitzpatrick's case (Minn.) 90 N. W. 358.....	103
Frost, 53 Ind. 390.....	38
Furman, 18 Cal. App. 41.....	37
G.	
Games v. Robb, 8 Ia. at 199.....	89
Gelpke v. Wall, 194.....	65, 70, 71, 74, 83, 95, 107
Grand Trunk Western Ry. Co. v. South Bend, et al., 227 U. S. 544.....	107
Green's case, U. S. 109 U. S. 104.....	66, 72, 81, 90, 95
Groves v. Slaughter, 15, Peters, 449.....	66
H.	
Haines, 33 Iowa, 516.....	46, 79
Hammerstein v. Thompson, Clark & F. 245.....	37
Hartford Co. v. Ry., 70 Fed. 201.....	106
Haulman, 164, Iowa, 471.....	33, 47
Havemeyer, 3 Wall. 294.....	65, 70, 76, 95, 96
Henry's case (R. I.), 73 Atl. 97.....	37, 100
Hoffman v. Stiger, 28 Iowa 302.....	25

INDEX.

Page

I.

Ingersol's case (Tenn.) 119, Am. St. Rep. 1003..... 100

J.

Jenkins v. Ballantyne, 30 Pac. 760, 8 Utah 245..... 104

Jones v. Cable, 114 Pac. 586..... 107

Jones v. Hotel Co., 86 Fed. 373 23

K.

Kents Com. 37, Vol. 4.....56, 100

L.

Lahr v. Elevated Railway Co. (N. Y.) 10 N. E. 528..... 91

Lamson, 76 U. S., 485, 486.....65, 94

Lane's case (Mont.) 13 Pac. 136, 139..... 102

Langworthy, 46 Iowa, 64..... 47

Larimer, 130 Iowa, 706..... 33

Leahy, 75 N. Y. S. 72..... 37

Leavenworth v. Miller, 7 Kan. 479, 501..... 100

Lee's case, 7 Wall. 181.....65, 70, 95

Lewis case (N. Y.) 56 N. E. 548..... 93

Leffingwell, 2 Black at 603..... 95

Lunning, 168 N. W. 140..... 46

Locke (Penn.) 13 Am. Rep. 716..... 100

Loeb, 79 U. S., 472, 21 Sup. Ct. at 182.....65, 66, 71, 96

Louisiana v. Pilsbury, 105 U. S. 278.....73, 95, 107

M.

Mallory, 71 Iowa, 63, 62..... 47

Mayburry, 15 Peters 21.....39, 108

McDaniel, 55 Iowa, 312..... 46

McKinnon, 57 Fed. 409.....33, 54

McMillen v. Boyles, 6 Iowa, 304..... 89

McMillen v. County Judge, 6 Iowa, 390..... 89

Merchant's Exch. v. Knott (Mo.) 111 S. W. 565, 571... 100

Metler, 19 N. J. Eq. 457..... 47

Miller v. Dunn (Cal.) 14 Pac. 27, 29..... 103

INDEX.

	Page
Mitchell, 4 Wall. 270.....	65
Morley's case, 146 U. S. 162, 13 Sup. Ct. Rep. at 56.....	95
Moore v. Otis, 275 Fed. at 751.....	73
Muhlker (N. Y.) 66 N. E. 558.....	84
Myrick v. Heard, 31 Fed. 243.....	96
Muhlker, 197 U. S. 544.....	67, 69, 91

N.

Neil, 71 N. Y. Supp. 840.....	54
-------------------------------	----

O.

O'Donoghue, 63 Ky. 478, 480.....	100
Ohio Life Co. v. DeBolt 57 U. S. at 431, 432.....	66, 73, 77, 82, 87, 95
Olcott case, 83 U. S. at 693.....	65, 66, 86, 90, 94, 95, 97, 105, 106
Opelika v. City 280 Fed. 161.....	96

P.

Page Cont. par. 397.....	38
Paige 71 Iowa 318.....	24, 47
Park, Dower, 37.....	56
Paul v. Davis, 100 Ind. 422.....	105
People v. Quant (N. Y.) 12 How. Prac. 83, 84.....	105
Phelps case, 1 Wash. Ter. 518, 523.....	103
Platt v. County, 5 Iowa 151.....	88
Pleasant Twp. v. Aetna Co., 38 U. S.	66, 71, 107
Pope's case, 50 Tenn. 682, 701.....	105
Prichard v. Walker, 22 Ill. App. 286.....	23
Pritts v. Ritchey, 29 Pa. 71.....	75, 78

R.

Rapalje Law Dict.....	101, 103
Rigg's case (73 U. S. at 202).....	65, 69
Ring v. County, 6 Iowa, 265.....	89
Rood, Wills, Par. 51.....	36, 37
Rowan v. Runnells, 46 U. S. 139.....	66, 73, 77, 96
Rudd's case (Tenn.) 39 Am. Dec. 189.....	100

INDEX.

	Page
S.	
Samson case, 67 Iowa 252	46, 79
Schumaker, 41, Ala. 454	37
Schouler, Wills (5th Ed.) Par. 452, 454	38
Scribner, Dower, 269	56
Sharkespeare, 10 Hun. 311	38
Smith v. Douglas County, C. C. A., 254, Fed. at 247	33
Stahl v. Brown, 72 Iowa, 720	46, 79
State v. Binder, 58 Mo. 450	93
State v. Bissel, 4 Greene at 332	88
State v. Denny (Ind.) 21 N. E. 252, 254	100
State v. Fry, 4 Mo. 120, 189	100
State v. Lumber Co. (S. C.) 123 N. W. 504, 508	100
State v. Pett, 68 Atl. 661, 663, (R. I.)	104
State v. Ry. 3 Fed. at 888	95
State v. Rechnitz (Mont.) 52, Pac. 264	102
Stephens, Com.	103
Stewart v. Todd, 90 Iowa, 283	25, 32, 44, 74
Story v. Railway (N. Y.) 43 Am. Reps. 146	91
Studer, 69 Ga. 125	36
Sullivan v. Sullivan, 139 Iowa, 679	75, 78

T.

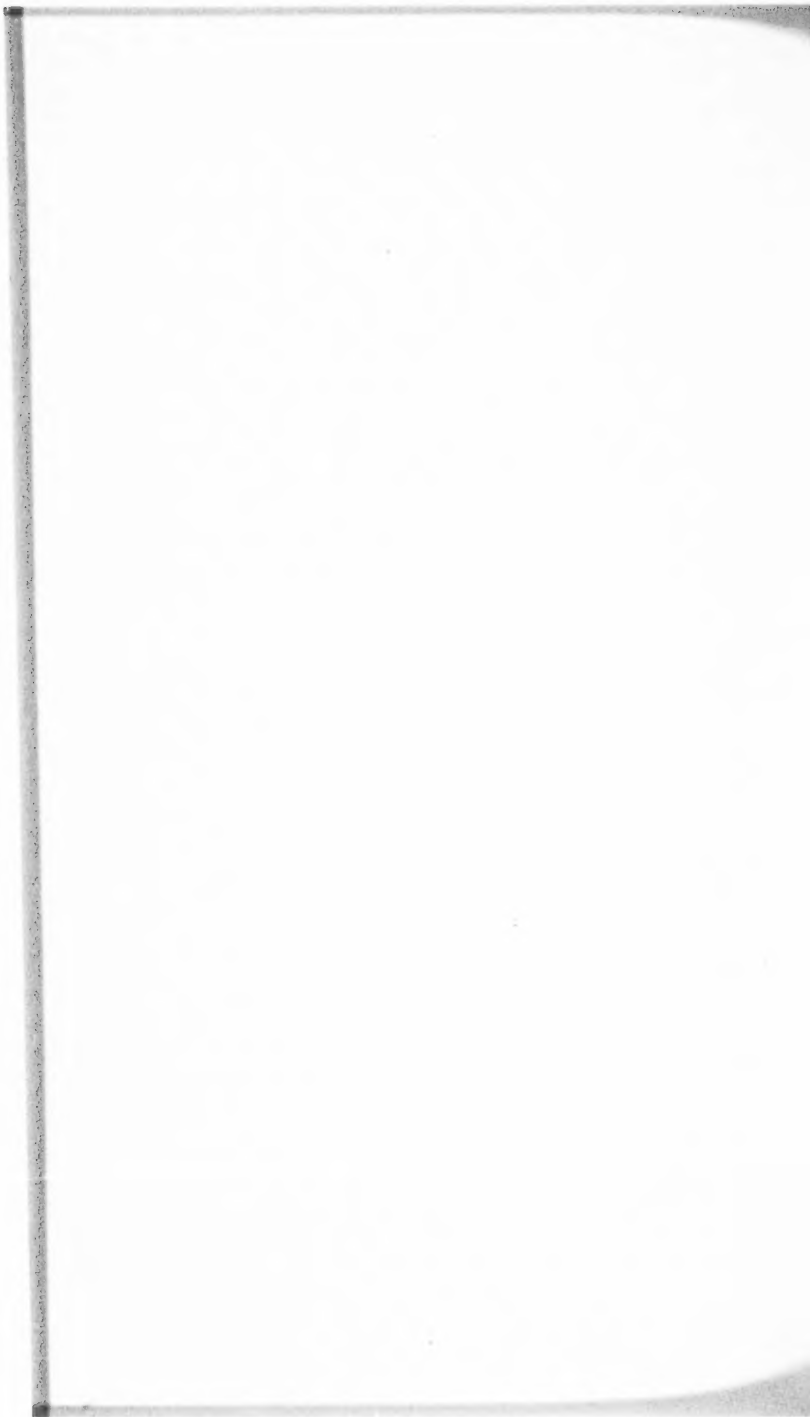
Talcott, 86 U. S. at 678	66, 95
Taylor, 4 Lea. (Tenn.) at 510	65
Taylor v. Smith, 160 N. C. 531	23
Taylor, 105 U. S. 72	65, 94
Thompson, 3 Wall. 330	94, 95
Trust Co. v. DeBolt, 16 How. 425	65

V.

Vosberg v. Mallory, 155 Iowa 165	47, 80
----------------------------------	--------

W.

Wade case, 174 U. S. 499	66, 73, 97, 98
Walpole, 5 Ves. 402	36
Webb v. Southern Ry. Co., 235 Fed. at 590	107
Woodard v. Woodard, 184 Iowa, 1178	54
Wood v. Logue, 167 Iowa, at 440	25, 64, 74



No. 175.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

ROBERT J. FLEMING, JOHN A. FLEMING, STAN-
HOPE FLEMING, ET AL., ETC., ET AL.,
PLAINTIFFS IN ERROR.

VS.

ANNA B. FLEMING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is writ of error to the Supreme Court of the State of Iowa. The questions involved are, (a) Whether that court erred in holding that despite three writings entered into by defendants (now plaintiffs in error) with their deceased brother Charles, his widow, the defendant in error, has the same right of dower that she would have had if said writings had not been made; (b) Whether a federal question is raised by said holding of said court.

As to said writings—

In view of certain declarations made in the opinions of the Supreme Court of Iowa in which the court fluctuates between ~~holding~~ that the three writings taken together control and also saying that the third writing controls, the fluctuations between holding that nomenclature is not material and again holding that it is; holding it to be material on the validity of a survivorship contract that it was made by those alleged to sustain the relation of partners; in view of the fact that the court finds what was not found in the trial court, to-wit, that a partnership existed, which finding is contrary to the undisputed testimony; in view of the fact that importance is attached to the claim that no joint tenancy can exist as to a commercial enterprise and overlooking that whether this be so or not the contracts here do not deal with a commercial enterprise but with the disposition of personal property accumulated in conducting such enterprise; in view of the fact that it is asserted a joint tenancy can exist only as to lands; and in view of the fact it is overlooked that there can be a valid survivorship contract even if the cutting off of inheritable interest is not effected through being an incident of a joint tenancy—we proceed to set out an analysis of the three writings perhaps more fully than is in strictness necessary, where, as here, the matters just referred to must and will have detailed attention in course of the argument.

The first contract stipulates that the signers

“Shall have only such share and interest in the profits, earnings and income of the business of Life Insurance in which the signers are or shall be jointly engaged, as shall be actually received by each or paid upon the order of each with the consent of the others, from the income of said Business.” (Tr. 4.)

"And any amount so paid shall fully represent the share and interest of each at any time while the undersigned shall be associated together in said business or thereafter." (Tr. 4.)

"And any sum of money paid to any party hereto shall be in full of the interest of said party in said business." (Tr. 4.)

The second contract provides

"That each party shall have only such share and interest in the profits, etc. * * * as shall be actually received by each, or shall be paid upon the order of each with the consent of the others from the general funds or income of said business." (Tr. 5.)

"Each of the parties to this agreement has and hereafter shall have only such share of and interest in the profits, etc. * * * of all contracts of insurance, etc. * * * in which we are now or any of us shall hereafter be jointly engaged." (Tr. 5.)

"And any sum or amount so paid shall fully represent the share and interest of each of the partners hereto at any time while any of the undersigned shall be associated together in said business or thereafter." (Tr. 5.)

The third contract provides

"And what said decedent has heretofore withdrawn from said partnership shall constitute his sole and entire interest therein and the sole and entire interest of his estate therein." (Tr. 6.)

The second agreement stipulates that it is made on the consideration

"Of the services of each of us rendered or hereafter to be rendered in the business of Life Insurance, of the income to be derived therefrom and of the mutual stipulations herein contained." (Tr. 5.)

The third contract provides

"That the partnership between the undersigned is with the express and distinct understanding and agree-

ment that all property heretofore acquired by the undersigned has been acquired as the results of said partnership and that said property now belongs to said partnership." (Tr. 6.)

The first contract provides that it is made

"To fix and determine the interest of each therein." (Tr. 4.)

The second contract says that it is made for one thing

"To more effectually define and determine our individual interest in said business in the future (Tr. 4), as between ourselves and in relation to all other persons." (Tr. 5.)

The first contract provides

"And it is distinctly understood and agreed between the parties that (neither) they nor any of them have or can have any property rights or money interest in said business other than hereinafter specified." (Tr. 4.)

The second contract concludes

"It being the intention of all the parties * * * and they hereby declare that (neither) they nor any of them have or can have any property rights or money interests in said business other than that herein specified and defined so long as any of them shall be associated together in the business of Life Insurance." (Tr. 5.)

The first contract provides

"And at no time shall any accounting be made or required to be made by any party hereto, his representatives, etc. * * * upon any basis of labor performed or money received on account of said business by any of the parties hereto or otherwise." (Tr. 4.)

The second contract provides

"And that at no time shall any accounting be made or required to be made by any person or any party hereto or their heirs, survivors, etc." (Tr. 5.)

The third agreement provides

"That the signers own the stock of Fleming Brothers, Incorporated; also real estate and other property in which each of them are interested—and that the contract is made because the signers expect to acquire additional property.

"And that it is made because said property now held and owned has been acquired and owned with the understanding that it shall be disposed of as is later provided in this contract." (Tr. 6.)

"This contract covers not only the property now owned but also property hereafter acquired; and all hereafter acquired property * * * whether standing in the names of said individuals or either of them or in the firm name is understood to be firm property unless there be express agreement to the contrary." (Tr. 7.)

The first contract provides

"Upon the death or withdrawal of any party hereto all his interest in said business shall thereupon cease and determine." (Tr. 4.)

The second contract provides

"It is further agreed that upon the death or withdrawal of any party hereto all his interest in said business and in the assets thereof shall thereupon cease and determine." (Tr. 5.)

The third contract provides

"That upon the death of either one of the undersigned the property then owned by the said partnership including all property standing in the names of the individual partners * * * shall be and become the property of the surviving brothers of the said partnership." (Tr. 6.)

This branch of the case presents, speaking in a general way, the following complaints:

1. That the Supreme Court of Iowa seems of opinion that the mutual obligations in these writings do not import a consideration sufficient to sustain the contract

made in the writings; that somehow or other there is at least a partial failure of consideration because some of the mutual promises are asserted to be such as it is impossible to perform—this, though no partial failure of consideration is pleaded.

2. The court seems to require for the sustaining of a survivorship agreement that each contributor to the joint venture must vest such title as he has or ultimately may have in each of the other parties to the contract, and that it is an insufficient disseizin and vesting to vest no title except that the last survivor shall have complete title of what property exists when he becomes such last survivor. And as it is the very essence of survivorship contracts that no one shall be vested with complete title until there is a last survivor, and as that is always the state of the title in such agreements, every decision that ever sustained a survivorship contract, therefore, erred.

3. To carry this to its logical conclusion the court held that when the property of those who are parties to such an agreement is by them surrendered to a corporation, that though the court asserts it looks to substance rather than to form, such change in evidencing the property owned avoids the survivorship agreement. It couples this with the argument that the shares of the corporation were never delivered at all, and with the further claim that the non-delivered shares effected a destruction of the survivorship contract, and this, though those very shares were made out and endorsed by each to the one who should be the last survivor.

4. It declares that the rights of the parties are after all to be measured by their contract and depend upon that contract, and also that the parties to it shall not have what the contract gives.

5. It makes fraud upon marital rights one argument, when in view of the contract between the parties Charles never had any property, since he died too soon—and thus is asserted a fraud upon rights that never came into existence.

6. It holds there can be no joint tenancy with the incident of survivorship, in a commercial enterprise. This, though the contracts do not attempt to create such tenancy in such an enterprise but deal only with ultimate title to the savings that may in future be made in conducting a commercial enterprise.

7. It advances the proposition that there may not be a joint tenancy except as to lands—a position contrary to all authority.

8. Its argument seems to take the position that the agreements at bar did create a joint tenancy and also that they did not—and it stresses the immaterial claim that such tenancies are no longer such favorites of the law as they once were, overlooking that its own decisions declare that the laws of Iowa still sanction such tenancies.

9. It overlooks its own declaration in the instant case that survivorship is only an incident in joint tenancy, and so ignores that there can be an effective survivorship contract even if there be no joint tenancy.

10. It holds against all authority that the members of a partnership cannot make a survivorship contract, and especially overlooks that there is no law against making such a contract as a condition to entering into the partnership relation at all.

11. Not only does it make the untenable claim that such agreement may not be made a condition upon which

the partnership relation will be entered, but it asserts against all the undisputed testimony that a partnership existed.

12. It rests this claim mainly upon the fact that in the third writing the words partner and partnership are used, although elsewhere it declares that nomenclature cannot create a partnership.

13. It concedes there is no express provision to share profits and losses, but finds that this essential element to a partnership relation is made by implication in these writings, though they say nothing about either profit or loss, but simply provide that each may draw what he needs (which means if it existed to be drawn) and that the last survivor shall take what remains (of course, if anything does remain).

14. It declares that the intent of the parties is to be found from what the three writings have and also that the third writing controls—which last position seems to be based wholly on the fact that the last uses such words as partnership—once more holding in one place that nomenclature is immaterial and in another that it is controlling.

15. It makes a distinction as to survivorship agreements made between husband and wife and holds that while such cuts off heirs, it does not cut off dower—overlooking that it cannot matter who makes such contract, for in that if such contract does cut off rights of inheritance it also cuts off dower. First, because both dower and the rights of heirs are the creature of statute and, second, if such contract works that the one who dies first dies seized of nothing, there can be no dower in what he did not leave, and that this is so whether it be a wife or an heir that attacks the contract.

16. The court departs from the rule heretofore always declared by it, to-wit, that as to personal property either spouse may dispose of same as he sees fit—and holds that personal property may not be disposed of by a survivorship contract.

17. It uses the fact that a testament cannot cut off dower by thrusting a testament upon these plaintiffs in error. It does this by saying that these contracts are nothing but the equivalent of an agreement to make a will. That such an agreement being broken creates the same situation as if it had not been broken and the promised will had been made—and that, therefore, what these plaintiffs in error are attempting to do is to cut off dower by asserting a testament. It is all an argument based upon a contract to make a will which in this case was never made, and upon holding that this contract or anything else which is not a duly executed will can ever be a will. And overlooks that if what is said in the opinion is true of this contract it was true in every survivorship agreement—which would make it difficult to understand how such an agreement was ever sustained by a court.

18. The instant decision is a mere oscillation. No reported case supports its pronouncement. And every case in the Supreme Court of Iowa before the instant one and every case since the instant one was rendered are opposed to the opinion now in review.

19. The decision now here is contrary to the decision of this court in *Mayburry v. Brien*, 15 Peters 21.

As to the jurisdiction of this court.

A Federal question is raised because the instant decision is a departure from the Iowa law as it stood at and

before these writings were entered into; and it is such a departure also from the construction of Iowa statutes, which statutes were in effect at and before these contracts were made, as that this departure in interpretation raises a federal question. This is especially so because of an Act to amend Section 237, Judicial Code, approved February 17, 1922. There is a Federal question, too, because the Supreme Court of Iowa gave the question when presented such consideration as that such question must now be considered here. (Tr. 130.)

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Iowa erred in holding that the three writings entered into by and between these three plaintiffs in error and their now deceased brother Charles, were ineffective to prevent plaintiff in error from asserting dower rights in an alleged estate which, it is alleged by her, her husband died seized of—. In other words, it erred in holding that an express agreement providing for survivorship in the accumulations in a business yet to be engaged in was not a valid contract. All contrary to the decision of this court in *Mayburry v. Brien*, 15 Peters, 20—and decisions without number.

II.

The court erred in declining to hold that the settled case law of the State of Iowa and the settled construction of its statutes as these existed at and before the time these contracts were made did oblige it to declare that the plaintiff in error had no dower rights, in that her husband died seized of nothing to which dower could attach.—And in holding instead that the decedent died seized of an estate to which dower could attach.

III.

The decision of the Supreme Court of Iowa now in review impairs the obligations of said contracts and is violative of the Constitution of the United States and of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

IV.

Said decision is contrary to the line of cases decided in this court of which the Muhlker case is perhaps the leading one.

GRAND DIVISION ONE.

THE SUPREME COURT OF IOWA ERRED IN ITS HOLDING THAT THE CONTRACTS AT BAR WERE NOT EFFECTIVE AS SURVIVORSHIP AGREEMENTS AND DID NOT HAVE THE EFFECT OF BARRING PLAINTIFF IN ERROR FROM ASSERTING DOWER IN A CASE WHERE WHEN HER HUSBAND DIED HE LEFT NO INHERITABLE ESTATE, BECAUSE HE HAD ENTERED INTO SAID AGREEMENT.

PART 1-A.

The court indulged in construing the writings, though they need no interpretation, and this needless construing was also erroneous construction.

We submit the court had nothing to construe, that the writings are perfectly plain, and that the only question is what is the legal effect of that which the writings clearly express. The first one says that it is made "in order to provide for the future uninterrupted prosecution of the business of Life Insurance in which we are now or may hereafter be engaged and mutually associated and to fix and determine the interest of each therein * * * upon the death or withdrawal of any party hereto all his interest in said business shall cease and determine." (Tr. 4, 5.)

The second recites that in view of how their business has been transacted, this contract is made "to more effectively define and determine our individual interest in the said business in the future."

The third recites that whereas each signer is owner of one-fourth of the stock of a named corporation, and also the owner of real estate and other property in which each of them are interested, that they expect hereafter to acquire additional property and whereas said property held

and owned by them has been acquired by them with the understanding that it shall be disposed of as hereinafter set out. Therefore, "the partnership between the undersigned is with the express and distinct understanding and agreement that all property heretofore acquired by the undersigned has been acquired as results of the partnership and now belongs to said partnership * * * that upon the death of either one of the undersigned the property then owned by the said partnership including all property standing in the names of the individual partners including stock in said corporation, shall be and become the property of the surviving brothers of said partnership * * * this contract covers not only the property now owned but also property hereafter acquired * * * and it, either standing in the name of an individual or in any of them or in the firm name, is understood to be firm property, unless there be express agreement to the contrary. (Tr. 6, 7.)

Up to this point there was nothing to construe. Each and all the writings create a survivorship and cut off inheritable interest. The court agrees that "the second contract though changed in wording expresses practically the same thought with the added purpose to transfer to the entity, whatever it is, all rights of Robert J. under his contract with the Mutual Life Insurance Company of New York (Tr. 96). While it is true, some of the later writings express the idea that the makers deem it necessary to clarify the earlier one or ones, neither needed clarifying or were clarified, and no material change in an earlier one was worked by any later writing. It seems to have been the common case of doing much needless writing and yet leaving all that was written too clear to need the interpretation of a court. The State District Court declared there was no need of interpretation for it said:

"Considering the terms of the agreements, it is clear they were made with an intent to establish a joint ownership of the property acquired by the brothers, with a right of survivorship upon the death of a brother in the surviving brothers or brother. Such intent and purpose appear in every contract. * * * The intent of the parties to the instrument set out above is clearly to create an estate with the incident of survivorship." (Tr. 55).

The District Court, too, went on the tangent that the third writing was in a way the controlling one. For it says:

"Be whatever the intent or purpose of the first two agreements, the last agreement is determinative of the rights of the parties involved, inasmuch as that agreement is the one in force when Charles Fleming died, and is the present working agreement of the partnership; therefore, upon the construction of that agreement must the rights and interest of the parties be determined." (Tr. 55, 56).

The fallacy is the treating the third agreement as a substitution instead of a supplement. It was no more in force when Charles died than were the other two writings. But, as said, the Supreme Court took similar grounds:

In this third instrument the parties to the first two have undertaken to define the relationship existing between them and to more clearly state the relation they sustained to the property and to define more clearly what they meant when they said in the first two contracts, "in order to provide for the future uninterrupted prosecution of the business of Life Insurance in which we are now or may be hereafter engaged and mutually associated." (Tr. 92.)

This last instrument is the last expression of these parties touching the subject matter of all three contracts and they themselves therein state in words that have definite and legal signification what they understood the relation was under which they operated. (Tr. 92.)

This last instrument is the last expression of these parties touching the subject-matter of all three contracts. and they themselves therein state in words definite and significant what they understood the relationship was under which they were operating.

As the third writing is the last expression of the minds of all these parties touching their relationship to each other and to the property, it might well be considered the controlling expression, determinative of their relationship and their rights in and to the property at the time Charles died. (Tr. 93.)

Within the cover of these writings must be found all that these men had in mind touching their personal relationship and their relationship to, and interest in, the property accumulated by the joint efforts. (Tr. 93.)

We look to what is written in the three instruments, taken as one instrument, to find the thought that lies back of the writing, the purpose and intent of the parties in the making of the writing, and to find the legal status that the writings create. (Tr. 92.)

That these parties had a purpose and an intent to accomplish something touching their rights, duties, and obligations to each other in the making of the instruments and a purpose to fix the rights of each in the property accumulated and to be accumulated, must be assumed.

Within these instruments the height, depth, width and length of that purpose must be found. (Tr. 92, 93.)

We submit the last is not more controlling than the first and that the proper analysis is made clear in the opinion of the court where it declares:

"What they have said in these contracts and what they had done in execution * * * is the only expression of their thought and purpose to which our minds are directed. These writings considered together show the mutual understanding and purpose of the parties."

There is not only needless interpretation but erroneous interpretation as well.

In the first contract it is provided:

"That each of the parties to this stipulation and agreement shall have only such share of and interest in the profits, earnings and income of the business of life insurance in which we are or shall be jointly engaged, as shall be actually received by either, or paid upon the order of either, with the consent of the others, from the income of said business. And such amount so paid shall fully represent the share and interest of each of the parties hereto at any time while we the undersigned shall be associated together in said business or thereafter. Upon the death or withdrawal of any party hereto, all his interest in said business shall thereupon cease and determine (and there is to be no accounting) * * * And it is distinctly understood and agreed between the parties hereto that (neither) they or any of them have or can have any property rights or money interest in said business other than that herein specified and defined, and any sum of money paid to or for any party hereto shall be in full of the interest of said party in said business." (4)

The second agreement repeats and also adds:

"Each of the parties to this agreement has and hereafter shall have only such share of and interest in the profits, earnings and renewals due or to become due under any and all contracts of insurance or commissions thereon to whomsoever nominally payable in the business of life insurance in which we are now or any of us shall hereafter be jointly engaged, as shall be actually received by each or shall be paid upon the order of each with the consent of the others, from the general funds or income of said business; and any sum or amount so paid shall fully represent the share and interest of each of the parties hereto at any time while any of the undersigned shall be associated together in said business or thereafter. It is further agreed that upon the death or withdrawal of any party hereto all his interest in said business and in the assets thereof shall thereupon cease and determine (and no accounting is to be made) * * * It being the intention of all the parties to this agreement and they hereby declare, that they nor any of them have or can

have any property rights or money interest in said business other than that herein specified and defined so long as any of them shall be associated together in the business of life insurance." (5)

In the third writing it is stipulated that upon the death of either one of the undersigned the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces said stock in Fleming Bros. Incorporated, shall be and become the property of the surviving brothers of said partnership; and that what said decedent has theretofore withdrawn from said partnership shall constitute his sole and entire interest therein, and the sole and entire interest of his estate therein. (6)

It would seem to be too plain for argument that this is a survivorship agreement covenant and that the death of one terminates his right and interest; and there is no vesting until there is a last survivor, and that therefore the one who dies first has no interest except to the extent of what he has drawn while living. Despite this clear language and unescapable reasoning the court has misinterpreted the clauses we have just set out.

It declares that these plain words do not mean what they say and what in reason they must mean. The court says: "The thought of the parties could not have been that the title to the property acquired as it came into existence should vest in no one, except the portion taken and appropriated by each to his immediate needs. (93)—And

"Analyzing these writings we find * * * that each had so long as he lived a right to use a portion of the income and profits of the business in which they were so mutually associated; that whatever his needs required, and to that extent only, he had a right to take from the earnings and income of the business such sum as he needed, upon the order or with the consent of the others.

This provision was intended to cover the immediate needs of each of the parties so associated and engaged in the business." (95)

This does more than ride over the plainest of words. It violates reason. There is express provision that what he so draws is all he shall have and that all other interests die at his death, which means, of course, that as his interest ceases when he dies, and he can draw no more after that, that his interest is restricted to what he will draw while living. Despite this, the court next says:

"Its purpose evidently was to forestall any extravagant tendency on the part of any of the brothers and to conserve the interest and profits of the business to the end that the business might not suffer from extravagance and be continuously interrupted."

To say that when one of these parties took from the profits of the concern any sum of money, however small, to meet his immediate needs, the same when taken would measure his interest in all the accumulations of the past years, could not have been intended to be literally construed.

If the parties were in fact and law joint tenants, then each had a right to enjoy the income of the estate and the fact that one of the tenants appropriated a portion of the income to his own use could not have the effect of destroying his interest in the subject matter of the tenancy. The idea of joint tenancy is that each tenant has a right to an equal enjoyment of the thing which is the subject matter of the tenancy.

If the receiving of any portion of the income or profits of the estate had the effect of destroying the interest of each in the subject matter of the tenancy, then upon the appropriation of any of the profits by the tenants or any of them, the joint tenancy would cease.

The provision of the contract above referred to (95) must have been intended as limiting the right to enjoy the income and profits of the business and not to take away his right in the subject matter of the tenancy. His right to

take was measured by his needs. What he took was a declaration by the taking of his then needs, and measured his right at that time to take to his personal use the income and profits.

It does not mean that it measured or could measure his interest in the property accumulated by the joint efforts of the parties, or that the sum of money received determined his interest in the property." (96)

In fewer words, when two or more agree that whoever dies first leaves all that remains to the last survivor, that all interest shall terminate at death, that the only interest ever possessed shall be what he draws in his lifetime—notwithstanding, what he so draws does not measure his interest. In other words, under his agreement, by dying first, he never gets an interest in the *corpus*, but the contract (without accounting) lets his estate keep whatsoever he has drawn in his lifetime. After death he can draw no more—yet, somehow, though he die first, and in the teeth of an express stipulation to the contrary, his estate does have an interest in the *corpus* beyond the amount that the decedent drew in his lifetime.

PART 1-B.

The inevitable followed. The erroneous interpretation led to disregard of what is correctly affirmed—led to correct statement of issue and of vital propositions, and not giving effect to either.

For illustration—It is recognized that the rights of plaintiffs in error depend upon the contracts—that it is all a question of contract. But the rights the contracts give are denied. The true issue is perceived, but is departed from. The court says rightly.

Assuming for the purpose of this discussion that a joint tenancy may be thus created, it would be nevertheless a status created by the "contract" of the parties and not otherwise.

Whatever the rights thus created, they must be determined in obedience to the contract and to nothing else. In the last analysis therefore we have before us a "contract," nothing more, nothing less.

Being a contract, it may be enforced as such unless there be some legal impediment thereto. (Tr. 113.)

"Here the issues are narrowed to the ascertainment of whether or not plaintiff's husband Charles died seized or possessed of any interest in the property held by these defendants or some of them. If it be determined he had an interest in the property at the time he died then she is entitled to a distributive share therein and her claim must be recognized and enforced * * * the determination of the question here involves only the proper construction of the three writings on which defendants rely to defeat her claim, to which specific reference will be made hereafter."

It is the claim of the defendants that all the property in controversy prior to and at the time of Charles' death was held by these four parties as joint tenants to which the right of survivorship attached; that upon the death of Charles all his interest in the property ceased, and this by virtue of the terms of certain written instruments under which the business was conducted and the property acquired and held at the time Charles died." (Tr. 89).

The trouble is that, as will presently appear, the contract is not obeyed, and the correctly stated issue is lost sight of or erroneously disposed of. There is an elaborate and correct statement of what is a joint tenancy, and that it cuts off inheritable interest. (Tr. 94, 95, 99). But little attention is paid to whether the contracts here create such tenancy. As will presently appear, about all that is done is assigning unsound reasons for asserting that here there is no joint tenancy. The court recognizes that survivorship rights are but an incident to joint tenancy. But elaborately argues that a survivorship right is the gist of such

tenancy, and that nothing but a joint tenancy can cut off inheritable interest (Tr. 113). It stresses the immaterial claim that joint tenancies are not as much in favor in other states as they once were—and pays no attention to its own decisions that such tenancies are sanctioned—see *Wood v. Logue*, 167 Iowa, 436, in which this is held, and also that neither law nor equity stand in the way of making a survivorship contract. It adds the intent was the granting of a unity of title with right of survivorship, and that the grantor had a right to prefer such an arrangement to “a tenancy in common with the ordinary incidents to such an estate”; that nomenclature is quite immaterial, that the thing created, whatever its right name, was a joint tenancy which cut off inheritable interest, and created a survivorship. And—

“Laying aside the question as to what name or designation we shall apply to the transaction between the grantor and grantees, what good reason can be assigned in law or equity for the courts refusing to give it effect according to its clear intent.” (Tr. 106.)

About as much as this can be rightly claimed, for *Baker v. Syfritt*, 147 Iowa, 49, 62.

Pronouncements that have the support of all authority, including the Supreme Court of the United States.

They are denied nowhere save in the decision now in review.

PART 1-C.

What it all comes to is that the contracts at bar are construed away, are made the subject of untenable attack and are arbitrarily held for naught.

It is by this method that the court reaches the conclusion that dower right is impregnable against any con-

tract. And yet the contract here is one as to which it is everywhere held that it stands in the way of that right. Let there be, or not be, a joint tenancy. This contract exists and is as effective against dower or distributive share as the court concedes a joint tenancy to be.

The case seems to be disposed of by a holding that "a consideration of all these instruments shows that they were not understood as creating a joint tenancy." (Tr. 100).

We challenge this pronouncement and submit the evidence shows that the understanding was that a joint tenancy had been created. But whether this be so or not it is beyond all question, and the writings show on their face, that an agreement cutting off inheritable interest and expressly giving title to the last survivor was made and was intended to be made.

Robert J. testifies "the arrangement was that we all work together, and we had what we wanted to live on when we had it, and we pooled the whole thing, that when I should die all three would have it, and when the next one would die the others would have it, and so on until the last Fleming would have it all." (Tr. 44.)

But whether the agreement shall be named one that creates a joint tenancy is mere matter of nomenclature. The vital question is whether it provides for survivorship and the vesting of title in the last survivor. That it does this is beyond debate. And it being the fact that such survivorship agreement was made, that is the controlling thing and where, as here, it is made, there is no inheritable interest in the widow of Charles. She has no dower rights.

We submit it is elementary that while survivorship is an incident to joint tenancy still survivorship may be created effectively by contract—that indeed, the Supreme Court of Iowa does not seriously challenge this proposi-

tion. Whether it does or does not, it is not the law that survivorship exists *only* as an incident to joint tenancy. Though there be no joint tenancy, under the contract here, there was nothing to transfer. The one who died first did not thereby give any estate. Under the contract, his dying first worked that Charles never obtained an estate—to again use the words of the court, his death caused him to fall away from the estate. His widow could not have dower until he died. And under his contract, when he died, and died first, he never had an estate, wherefore no dower could attach. (Mayburry, 15 Peters, 21.) Of this, more in another connection.

It is a permissible agreement that the future rights of the parties shall be based on the fact of survivorship, 17 Am. & Eng. Ency. Law, p. 65; that there may be lawful stipulation as to what at the death of all but one should be done with the accumulations the parties were then engaged in creating. The text above set forth is based on the authority of *Taylor v. Smith*, 116 N. C. 531; 21 S. E. 202; *Pritchard v. Walker*, 22 Ill., App. 286; *Jones v. Cable*, 114 Pa., 586, 7. These decisions hold that the fact that survivorship is no longer regarded as an incident of joint tenancy does not invalidate contracts which definitely provide that future rights of contracting parties shall be based on the fact of survivorship. And

“Although the right of survivorship as an incident to joint tenancy be abolished by statute it may nevertheless be given by will or deed, either expressly or by necessary implication, and such a statute does not prohibit contracts that make the rights of the parties dependent upon survivorship.”

As to fraud on marital right (Tr. 94) how could there be any. To be sure, the contract was made after the plaintiff had married Charles. But it is not claimed that

he had any interest in any property, at that time. At any rate, if he had personal property then, he could, as said, dispose of it at pleasure, including doing so by survivorship agreement. This record certainly fails to show that he had any interest in land at the time he signed this agreement. It all comes to just this. Charles signed this agreement which dealt with nothing but his chances of sometime accumulating personal property or lands bought with personal property, provided he was the last survivor. Certainly, plaintiff had no marital rights in this possibility at the time this contract created it. Charles then and there disposed of any personal property he might have in case he would not die too soon. In that contingency, no one possessed any marital right—so no marital right was subjected to any fraud.

PART 1-D.

There was no partnership, but it does not matter if there was. It may be made a condition to assuming that relation that all that the partnership may accumulate shall vest in the last survivor, and that he alone shall possess an inheritable estate.

In holding that the alleged existence of partnership prevented the treating of these plaintiffs in error as being joint tenants and the cutting off all inheritable interest, the court departed from *Paige v. Paige*, 71 Iowa, 318. And there was also a departure from the earlier construction of Section 2923 of the Code of 1897, involved in the *Paige* case.

The decision exhibits a departure from earlier construction of statutes and from decisions made earlier than the time at which these contracts were created, such change is retroactive, and, thereby, destroys the validity of

these contracts which were valid under said earlier constructions and decisions.

There was also such departure in construction of Section 2923 of the Code of 1897, as is proved by the decision in *Wood v. Logue*, 167 Iowa, 441, which holds said statute to sanction and validate such contracts as the ones at bar—and said statute provision became effective in 1860, and is still effective—and such construction holds not what the statute construed meant on the day it was construed, but what it meant from and after the day it took effect.

There was also a like departure from the construction of said statute made in *Hoffman v. Stiger*, 28 Iowa, 302, a decision much earlier than the dates of these contracts.

It never was the law that the partnership relation barred the making of a valid contract creating a survivorship.

In *Stewart v. Todd*, 90 Iowa, 283, there was an agreement to become partners. The partnership was thereupon formed on condition in the contract that the survivor "have all property left or owned by either party or in the firm name"—and the survivorship agreement was sustained. Which means of necessity that there can be agreements dealing with the partnership relation which work a survivorship, and that the one dying first dies seized of no interest in the partnership property.

In *McKinnon v. McKinnon* 56 Fed., 409, (C. C. A) it is held, that where an uncle and nephew entered into articles of partnership to practice medicine, a provision in the partnership agreement that "in the event of death of the senior member of the firm all his property, personal and otherwise, which he held in partnership at the time of his death, shall go to the junior partner,—such contract should be enforced.

We submit that nothing in the law prevents the creating of a joint tenancy with its incident of survivorship, and on part of a partnership. So far as there is a rule on the subject, none are excluded from creating such a tenancy except "bodies politic or corporations." 23 Cyc. 484, point 3.

This stamps one major holding of the court as being irrelevant. It is immaterial whether or not here was a partnership. What the situation might be if the last surviving member of a partnership sought to assert the cutting off of inheritable estate in a deceased partner on a claim that the alleged partnership was a joint tenancy, and not a partnership, and that therefore, he was entitled to the incident of a joint tenancy—survivorship—is not in this case. Whether there can or can not be a joint tenancy; whether or not these plaintiffs in error are or are not partners; whether or not the four in their lifetime were or were not partners; whether the surviving brothers can have survivorship by claim to be joint tenants—is all immaterial.

The question is, whether four men, even if they became members of a partnership, are barred from making a survivorship agreement. What law exists which prescribes that men, who are free to enter a partnership or not to enter it, may not attach conditions to assuming the relation of partners. What law prevents each of them from insisting that before they will assume a partnership relation they will guard against the interruption made by death; and as a means to that end contract that as to what the partnership may hereafter accumulate the last surviving member shall take all that remains of the partnership property. It is not always true that when one partner dies his legal representative becomes vested with whatever interest decedent had in the partnership; nor that

his wife has a distributive share. That all depends. It does not follow as to any estate the partner had in his lifetime. But not as to an estate acquired by a partnership which was formed on condition that there should be no inheritable interest. When that is the agreement, the partner leaves no inheritable estate in the partnership property because, dying first, he but falls away from owning such property—because he dies too soon.

Of course, no such agreement could cut off dower rights as to any property owned by either partner at the time when such an agreement was made. And if the partnership accumulated property before a survivorship agreement was made, such agreement would not cut off dower. But the question is what law prevents those who are not yet partners from making it a condition of creating the partnership that as to property not yet owned by either member, or by the proposed partnership, inheritable interest shall be cut off.

PART 1-E.

If the fact that the agreement was conditioned there should be a partnership only if survivorship was first created, were material, the evidence does not justify the finding that there ever was a partnership.

The question of whether a partnership ever existed was made an issue in the pleadings. (Tr. 2, 3, 9). The trial Court made no finding on that issue but the Supreme Court of Iowa asserts that a partnership existed. It finds this by interpreting the three writings that the four brothers entered into. (Tr. 100). It is ruled, rightly enough, that the failure in the first two writings to name the arrangement a partnership is not fatal, and that the failure so to name is not material where the agreement contains all the ar-

rangements necessary to create a partnership and where the intention to form one is clear. (Tr. 99). But all this is disregarded because the finding a partnership to exist is made to turn almost wholly on the fact that the third writing frequently uses the words partner and partnership. (Tr. 96, 97). A fair summary of it is that for the purpose of finding that a partnership existed nomenclature is immaterial, but as against any argument that a partnership did not exist the naming the arrangement made a partnership, is of controlling importance.

A striking illustration is the treatment of the claim that no partnership exists because there is no contractual arrangement to share either profits or losses, or both. This, the court meets by again asserting that while such contractual arrangement may be essential yet there is nothing in a name, and that an arrangement to share profits and losses or either may, though not stated in express terms be held to exist if its existence is fairly to be implied from what is said; (Tr. 97.) that an express arrangement on that point is merely a strengthening of a presumption that profits and losses will be shared which arises from the mere fact of an arrangement to engage in a joint enterprise and to share the profits (Tr. 99) (which, by the way, assumes there was an arrangement to share profits.)

If there is an agreement to share profits it must be (according to the court) because there was an agreement that each would devote his entire time to the business. At any rate this is the foundation of said implication, and the court fortifies this by the fact that each of the partners has agreed to put all his property, all his labor, all his time, and all his energies into the business—and it is said that thereupon it may be assumed that the signer by so doing subjects and agrees to subject himself

to all the losses which flow from the enterprise because he has staked his all upon the cast, and he must stand the hazard of the die—wherefore, there is an inevitable implication that each must have intended to share the losses. (Tr. 99).

And there is nothing in the record upon which to base, the finding that all understood the arrangement to be a partnership except the fact that the court abandons its position that nomenclature is immaterial, by holding it to be immaterial as to the first two writings which do not use the word "partner" or "partnership," but to be material that the third writing frequently uses these words. And the bookkeeper, Miss End, had no such understanding after an exhaustive examination of all the books ever kept. After having said that there was no general balance and being then asked, "so it does not go into the partnership," she answered, "there is no partnership. And it does not go into the books of the Fleming Bros." (Tr. 32).

We agree with the court that in determining whether a partnership existed under these contracts there may be taken into consideration among other things the subsequent conduct and admissions of the parties. (Tr. 99). But we submit that everything that was done or omitted denies the existence of a partnership. Though the court has attempted to construe it away, the contracts each and all provide that each member may draw at pleasure without accounting, which is not a usual attribute of a partnership relation. Though the court strenuously construed it away, the contracts do provide that what is drawn in the lifetime is as to all but the last survivor all the interest that the drawer can ever have. That is not a usual attribute in a partnership because, there, each partner at all times owns an aliquot share of whatsoever the partnership entity has,

and any partner dying is seized of such share at the time he dies. See (Tr. 96, 97, 100).

And the direct testimony can also not be eliminated by any construing.

The direct evidence on whether or not a partnership existed seems to consist first of the testimony of plaintiff as a witness. She was told she had already stated the property belonged to all the brothers, and asked who she meant by that, whether all four of the brothers—and she answered,

All four of the brothers has been my understanding ever since I was in their family; whatever was earned belonged to the four in equal shares, and all their bills were paid and my husband was supposed to share his the same, and charged to him has been my understanding.

She was then told she had already stated that the expenses were handled by the brothers, and to say what she meant by that, and she answered,

Well, I supposed and have always believed and thought, and as far as my knowledge went, that the expenses was divided equal. That is, whatever expense that I was to or whatever I took out was charged to my husband, and whatever the other families drew from the firm, or the amount of money or whatever they call it, it was charged to each one of their—the head of their family. (Tr. 21.)

Robert J. Fleming testified that he was and for years had been a member of the brotherhood or "aggregation" known as Fleming Bros., and that his brother Charles was a member of that group during his lifetime. (Tr. 33).

In addition to the contract provision that the purpose was to avoid the outstanding attribute of partnership, (4) that death works an interruption and a dissolution—everything shows that no partnership was in-

tended or formed, and that therefore there never was an inheritable estate either in partnership property or the estate of a partner. It appears that all essential things that are not done by a partnership were done, and that what partnerships usually do was not done.

There never was any attempt to divide (47), there was no distribution (31), nor partition (43); never an ascertaining of the present value of the interest of anyone (47); there was no separate property (46, 47); nor individual credit for earning, salary or dividend (29, 30); nor individual bank account (19, 27, 28, 47).

The families drew at will for every sort of family expense, and with no accounting save that the totals went into profit and loss (17, 18, 19, 21, 22, 27, 28, 29). All expenses by the brothers, including their personal ones, were handled by check of Fleming Bros., and the only accounting was putting the totals into profit and loss, (28, 44, 46, 47). They drew without limit because of the survivorship contract (44). The draw included club, church and lodge dues, (30, 31, 32). No account was kept from which could be ascertained what were relative drawings or earnings by the brothers (30, 43, 44). During the 28 years, no balance sheet was kept, nor balance sheets as to profit and loss (30, 31).

The testimony as a whole demonstrates conclusively that while accounts were kept that made it possible to ascertain how the Fleming Brothers organization stood financially, there never was an attempt to keep an account as between, and no way to tell how matters stood between, the brothers.

PART 1-F.

The decision is not sustained because of its assertion that the contracts at bar constituted an ineffective testamentary disposition. Such holding conflicts with the case law everywhere, including that made by the Supreme Court of Iowa.

The court declares:

"The provision therefore in the contract that upon the death of any member his interest in the partnership property should pass to his brother partners is an attempt to make a testamentary disposition of the interest of each partner * * * an attempt to create survivorship among partners is an attempt to make a testamentary disposition of the dying partner's property or his interest in the partnership property in favor of the surviving partners, to take effect after his death." (Tr. 100.)

If this is sound, how could the same court sustain the contract in *Stewart v. Todd*, 90 Iowa 283. Why did it not avoid that contract by holding it was a testamentary disposition lacking the forms prescribed for a valid testament. In the *Stewart* case it is held that even if this were a contract testamentary in character, and though it was not executed with the formalities of a will, it is saved because as here the contract rests on consideration. How could there be a contract in the nature of a testamentary disposition. How could there be an attempt at a testament when, if a signer dies first he would not die seized of any estate. How can this be a contract to dispose of property upon death when by reason of dying first, Charles left no property—in the words of the court:

"The joint tenancy when created vests in each of the tenants a common right in the property which does not survive his death, unless he becomes the last survivor of all the tenants. Then, for the first time, does that which before consisted in a practical sense of a life estate

in the property become vested as an estate of inheritance. In a legal sense his death does not transfer the rights that he possessed in the property to the surviving tenants. Death does not enlarge or change the estate. Death terminates his interest in the estate. It is rather a falling away of the tenant from the estate than the passing of the estate to others." (Tr. 99).

How can one who becomes a party to a survivorship agreement, and dies too early, be held to have made a testamentary disposition. He has no estate while he lives, and by his death is prevented from ever having any—necessarily his contract could not be treated as a testamentary disposition at the time of his death if, by the terms of his contract, the time of that death put him so he never had anything to dispose of by testament.

Since the said contracts recognized as existing and also expressly provided for a present vested joint estate, they are not testamentary in character and are valid and binding upon all whom they affect, the plaintiff included.

McKinnon v. McKinnon, 57 Fed., 409. Opinion by Thayer, J., concurred in by Caldwell and Sanborn, J. J.

Wood v. Logue, 167 Iowa, 436.

Vosberg v. Mallory, 155 Iowa, 165.

Haulman v. Haulman, 164 Iowa, 471.

Larimer v. Beardsley, 130 Iowa, 706.

Smith v. Douglas County, 254 Fed., 244.

The court finds that because a partnership existed the agreements at bar constitute an attempt to make a testamentary disposition of the interest of each partner (a concededly non-permissible disposition) (Tr. 100). One point made in the McKinnon case, C. C. A. 56 Fed., 409, which was a survivorship contract involving a partnership, was that in that case such contract constituted a non-permitted testamentary disposition. And the court held that the point was not well made.

Indeed, this declaration of the court proves too much. If survivorship agreements are a non-permitted testamentary disposal they are that whether they are made by partners or by those who do not sustain that relation. And, if that be so, one cannot understand how any survivorship agreement ever was judicially enforced. For according to the Supreme Court of Iowa all such agreements were non-enforceable because they were an attempt to avoid the statute law concerning testamentary disposition as affecting dower.

And here as elsewhere the court overlooks that if all that it urges were granted there is still no reason why even an agreement in the nature of a testamentary disposition is not to be enforced, where, as here, it rests upon adequate consideration.

PART 1-G.

Related to the assertion of ineffective testamentary disposition is the creation by the court of an imaginary contract to make a last will—and thereupon holding that the making of this imagined contract and its imagined breaking, operate to create a testament—and that therefore plaintiffs in error are attempting to cut off dower by a provision in a will, which of course may not be done.

The court rightly declares that Section 3376 provides the share of the survivor cannot be affected by any will of the spouse unless that spouse consents thereto; rightly declares that this statute has been held to be applicable to personal property and as well as to real estate. (Tr. 114). rightly adds that the widow is entitled to her share in such of the decedent's estate as by his efforts he has accumulated and leaves at his death, and that the husband may not take this away by any testamentary disposition. (Tr. 93, 94). Upon these sound premises it is ruled that, somehow, the plaintiffs in error are attempting to defeat

dower with a testament. The flaw lies in the assumption that the contracts at bar in some way constitute either a contract to make a will or the equivalent of a will.

The record shows that just such unfounded assumptions *are* the basis of the aforesaid ruling. The court says:

The contract was analogous to and fairly equivalent to a contract to make a will, and only in that character can it be given effect. (Tr. 114.)

It became enforceable as an incumbrance, if at all, against his estate, after his death, and not before.

The result is that the decedent left an estate.

And the contract must be deemed to operate as a claim or incumbrance upon it either in part or in its entirety, in the same manner as a contract to make a will.

Though therefore the contract be deemed enforceable as one to make a will, the question remains whether it is effective as against the widow of the decedent, Charles. (Tr. 114.)

The question still remains whether the fact that the husband during lifetime contracted to make such a will, will avoid the operation of Section 3376. May the wife assert the impediment of the statute, against the operation of such contract.

A contract to make a will would be fully performed by the making of the will. Would the operation and effect of such will be subject to Section 3372? We answer, yes.

If Section 3376 disabled the husband from making a will detrimental to the wife, could the husband nevertheless make a valid contract obligating him to make such a will?

Doubtless it were more accurate to say, not that the husband was disabled from making the will, but that the operation and effect of his will would under the statute be subject to the consent of the widow so far as her distributive share was concerned. (Tr. 115).

Though in this case no will was in fact made, the contract could nevertheless be enforced to the same extent as though the will had been made and not otherwise.

The enforcement of the contract is subject to the limitations of the statute because the will itself would be subject thereto. (Tr. 115, and see Tr. 99, 100).

The argument is this: (a) This is a contract (Tr. 122) to make a will, which contract has been breached. (b) Whensoever such an agreement is made and broken, the remedy of the party not in fault is that he is to be treated as if the will agreed to be made had been made; and he must be dealt with as one basing his rights upon a duly executed testament.

Now, whatever may result from the making and breaking of a contract to will it does not result here, because the contract here is the permissible agreement that the future rights of the parties shall be based on the fact of survivorship (17 Am. & Eng. Encyc. Law Page 65)—was a lawful stipulation as to what should at the death of all but one, be done with the accumulations the parties were then engaged in creating.

Whatever may result where a contract to make a will *is* made that is immaterial where no such contract was made; and here there was no thought of making a contract for or of a will.

The inquiry whether the agreement here be "the equivalent of a contract to make a will" is an immaterial inquiry. For, if it be conceded to be such contract, and to have been breached, not a step is taken towards putting these defendants in a position of one who is basing his rights upon a testament. There is still no will—there is nothing but a broken contract.

An attempted will which fails to be that because not executed as required by statute may be evidence to establish the existence of a contract to give, but is not and cannot be a testament. It ever remains a contract only. Studer, 69 Ga. 125; Wallpole, 5 Ves. Cr. Rep. 402. That is so true that it has been held that contracts to make a will are not entitled to probate because "contracts cannot be probated." Rood, Wills, Par. 51 a.

And the courts have gone so far as to deny probate to instruments that were wills because they were executed in pursuance of a contract such as made the will irrevocable. Sir John Nicholl said: This very irrevocability "destroys the very essence of the will and converts it into a contract, a species of instrument over which, this court has no jurisdiction." And see Rood, Wills, Par. 52; Hobson, 1 Addams, 274, 275; Schumaker, 41 Ala., 454; and Anderson 63 N. J. Eq., 264. (Tr. 124.)

But as said in the Stewart case, here, if it is true that if the writing cannot be enforced as a testamentary instrument, it may if, on consideration, be enforced as a valid and binding contract. To the same effect is *Baker v. Syfritt*, 147 Iowa, 65.

"There is nothing peculiar about contracts to make provisions by will. An actual contract must be shown. The parties must have been competent. Their minds must have met on a certain and definite agreement, unless the facts disclose simply a promise which would sustain an action on *quantum meruit*."

Rood, Wills, Par. 54.

But assume that here is a broken contract to make a will, does it follow therefrom that this creates a will, and that therefore these defendants are in the position of seeking to deprive the widow of her distributive share by what amounts to an attempt to take it from her by a will. That can be true only if on breach of a contract to will a will results—and it does not result.

Such a contract, though broken, remains just a contract, and the remedy on breach is a complaint of the breach, with demand for damages, *quantum meruit*, or other remedies allowed for breach of contract. *Hammerstein v. Thompson*, Clark & F., 245; *Henry v. Rowell*, 64 N. Y. Supp., 488; *Leahy*, 75 N. Y. S., 72; *Furman*, 18 Cal.

App. 41; and 1 Schouler, Wills (5th Ed.) Par. 452-454; Albright 103 Iowa, 101.

Or in some cases, recovery of the value of what claimant has given for the promise. Frost, 53 Ind., 190; Sharkespeare, 10, Hun., 311.

Or *quantum meruit*. Taylor, 4 Lea (Tenn.) at 510;; Juncey, 9 Grat. (Va.) 708; Beach, Cont. p. 786; 2 Elliott, Contracts p. 454, note 20.

This means that a will can be a contract, also.

But though a will may sometimes be dealt with as a contract and though a deed or other paper executed as a will may be a testament, even if not in the usual form of wills, it has never been held that a contract to make a will of any other contract which is not executed with statute formality can be substituted for a will, or be treated as being a will, either for the purpose of attack or of defense. (Tr. 124).

Both as to substance and remedy such a contract is but a contract—never a substitute for a “will.” 3 Elliott, Cont. pp. 218, 797; 1 Beach, Contracts, p. 487; Bishop, Cont. 516, 518; Page, Contracts, p. 2466.

No writing which lacks the statute attestation is a will for any purpose.

We submit the court may not manufacture a testament and thrust it upon a litigant and thereupon deny him rights, upon the ground that he has no rights which he can base upon a will.

PART 1-H.

The contracts are valid because by them each signer exercised his right to dispose of personal property as he pleased—he disposed of what the joint venture might accumulate. The court holds these contracts were not effective to pass a present estate in any particular property, jointly or severally owned during the lifetime of decedent (Tr. 114).

Surely this survivorship agreement was a disposition in lifetime of *something*. What was that something? It did not exist when the contracts were signed, so at that time no dower could attach. Neither signer at the time of signing owned anything. All the accumulation, so plaintiff herself testifies, were made after the signers went into business under their contract (Tr. 21). It appears that at the time of signing, no real estate was owned; that it was acquired later and was always paid for out of the joint funds and that when any such land was sold, the proceeds went into the joint funds (Tr. 46); that at the time the first two contracts were made, neither signer had any interest in real estate which has not since been disposed of. (Tr. 34.) True, they now own valuable real estate (Tr. 45.) Despite all this, the survivorship contract did nothing but create a survivorship right in possible future personal property, which might be or was later turned into this real estate. The contracts remain a something that deals only with personal estate to be acquired in the future. Wherefore the statutes dealing with alienation of land and cutting off dower right by joining in a deed, are not applicable. The something that was disposed of was in the language of the Mayburry case, 15 Peters 21, a “mere possibility of an estate” which might be “defeated by survivorship.” A disposition it was of what a partnership then being formed might accumu-

late. Such disposition as there was, was therefore a disposition of personal property.

It would seem to be fair reasoning that the Iowa rule as to the right to dispose of personal property has its functions in the case at bar for just two material propositions: (a) as it is an absolute right to dispose of such property at will, with or without consideration and without regard to the underlying motive, then the fact that Charles was more provident than to transfer or part without consideration and that he acted from a proper motive, may change the rule as to personal property—that he may do what he likes to the end that he shall not be seized of any personal property when his death comes. In other words, though he could have given away whatever personal property he ever had, and with any imaginable motive, he could not, though the youngest and the most likely to be the last survivor, agree that he should have no personal property at the time of his death, and arrange for a proper purpose and on good consideration that there might never be any personal property to which dower could attach. (b) The law which allows the disposal of personal property at will does not govern in disposal of personality by survivorship agreement.

That was never held in Iowa until done in this case. The Supreme Court of Iowa, till now, has always asserted the contrary—see page.....

PART 1-I.

One position upon which the court avoids the contracts, is but the immaterial and erroneous holding that a joint tenancy cannot exist as to personal property and exist only as to lands.—Contrary, inter alia, to Baker, 147, Ia., 49.

In *Baker v. Syfritt*, 147 Iowa, 49, the same court enforced a contract creating survivorship which covered

both lands and personal property. In *Stewart v. Todd*, 190 Iowa, 283, the court enforces such an agreement which covers some eighteen thousand dollars worth of personal property and also a large amount of lands. The survivorship agreement enforced in *Smith v. Douglas County*, C. C. A., 254 Fed., at 247, covers both real and personal property.

A joint tenancy is not confined to real estate but may so exist in personal property.

Atty. Gen. v. Treas., (Mass.) 110 N. E. at 299, 300.

PART 1-J.

Another erroneous position taken by the Supreme Court of Iowa, is the immaterial one that a joint tenancy cannot exist as to a commercial enterprise, which is not only erroneous but is irrelevant because here the agreement is not a dealing with a commercial enterprise but with what might in future be accumulated from carrying on such enterprise.

It is declared that "the property in question came into existence only by the joint efforts of these men working hand in hand, shoulder to shoulder, in a common enterprise, with a common purpose. That purpose was the accumulation of property, the building up of a fortune." (Tr. 93). It is next pointed out that it was the purpose of the feudal system to keep the title in one person * * * "but never so recognized in this state, or generally, as applying to commercial enterprises." (Tr. 95, top Par.)— and that

"Considering the foundation upon which the doctrine of joint tenancy rests it is the opinion of this court that it does not apply to commercial enterprises of this kind, and

that no joint tenancy can arise out of a commercial enterprise such as we have here before us in this case. It is inconsistent with the very foundation principle upon which joint tenancy exists or can exist." (Tr. 95, Par 2).

To say nothing of the fact that nomenclature is not controlling, that a survivorship agreement may be valid though no joint tenancy exists; to say nothing of *Stewart v. Todd*, in which the same court sustained a survivorship agreement which in terms deals with the conducting of a general store (surely a commercial enterprise)—to say nothing of *Smith v. Douglas County*, C. C. A., 254 Fed. at 247, where a survivorship agreement was enforced wherein the survivor should use the name of a partnership "and continue to buy and sell securities of all kinds, real and personal, in all manner of ways, as has been done heretofore, and do every and all acts whatsoever as fully as when we were both alive"—there is here no agreement as to a commercial enterprise by a survivorship agreement but a contract as to what may exist in the way of property when there is but one survivor. That this property may come from the conducting of commercial enterprises or from any other source, is not material. The contracts would remain operative if the business in which the four brothers were engaged were abandoned. (See *Stewart v. Todd*.) Despite such abandonment of such commercial enterprise, whatever property existed when all but one had died would become his property. In a word, these agreements do not deal with the conducting of a commercial enterprise or any other enterprise but reach only whatever property exists (no matter how acquired) at the time when there is but one survivor—and what is said as to commercial enterprise would, therefore, be irrelevant if it be assumed there can be no joint tenancy as to a commercial enterprise.

PART 1-K.

The court errs in holding that in some manner the contracts at bar are not sufficiently supported by a consideration. See 110, N. E. (Mass.) at 299, 300.

It says that the existence of the consideration through mutual promises has been stated by way of assumption only, and it is added:

"In some respects the contract on its face attempted the impossible. It attempted to dispose of the respective interests of the partners and yet to retain the same; to do and yet not to do; to give and yet to withhold. In the nature of the case such contradictions are not enforceable." (Tr. 114).

"It must be noted however that these mutual promises all carried the same infirmity. Each and all were assailable upon the same ground as for failure, or partial failure, in that more was promised than could be performed. If this decedent had survived his brothers and had sought to enforce their promises he would have encountered the same impediment as they have encountered, so that the performance permitted here is as full as the consideration is valid. By their very nature the mutual promises were exactly equal in value as mutual considerations. Between performance and consideration therefore there is complete mutuality in that the one is the full measure of the other.

Promise is partial because the validity of the promised consideration was only partial. The partial failure of consideration would be a just ground of offset against full performance. No legal damage accrued therefor, even as against the decedent or his estate.

In assuming the validity of the consideration of the contract therefor, we do so with this qualification." (Tr. 116).

It is a fair analysis of this that the incident of survivorship that flows from a joint tenancy has no existence because it represents an impossibility; that is to say, all joint tenancies have exactly the same doing and not doing and the same alleged "impossibility," that the court points

out here. The same impossibility attends the execution of any survivorship agreement. In fewer words, in every case where this attribute of a joint tenancy was enforced, or such a contract ordered executed, the courts erred because they failed to realize that the impossibility argument stood in the way. The books are filled with cases where this "impossibility" was not thought of and was disregarded. For one, the Mueller case, 131 Iowa, 650, as analyzed in *Stewart v. Todd*, holds a contract such as the one at bar was fully supported by lawful consideration. At the least, it decided that mutual promise creating the survivorship supports such contract.

It is said in *Stewart v. Todd*, 190 Iowa, 283, that where the writing cannot be enforced as a testamentary instrument it may, on consideration be enforced as a valid and binding contract. To the same effect is *Baker v. Syfritt*, 147 Iowa, 65.

It can not be denied that here there were mutual promises and the contract recites that the consideration is "the service of each of us rendered in the business of life insurance or of the income to be derived therefrom and of mutual stipulations herein contained." It can not be denied that such service was rendered; nor denied that such writing and such service import a consideration. The utmost that can be claimed for the court is an assertion that the contracts are injuriously affected because complete performance of part of the mutual undertakings is impossible. As said, there was just that difficulty, if it be one, every time a survivorship right was enforced.

Be that as it may, nothing more than a *partial* failure of consideration is even asserted. Such failure of consideration and part failure are matters which under Section 3629 of the Code of 1897 must be "specially pleaded." That seems to be the general rule. It is said in 13 C. J. 741:

"A plea of partial failure of consideration in an action on a sealed instrument reciting a consideration is bad. And at common law partial failure of consideration could not be set up as a defense unless the transaction was fraudulent in its inception. Defendant was obligated to resort to a cross action to recover his damages unless he could show an entire failure of consideration."

While it is true the same text declares that now if there be statute or judicial decision it is generally permitted to interpose the defense of a partial want of consideration or of failure of consideration in the action on the contract (thus preventing circuity of action), of course, that does not say that a denial of *all* consideration in a written instrument which imports a consideration is a good plea to raise a partial lack of or failure of consideration. This text makes this plain by saying that while such defense may now be interposed that is so only "when the facts constituting the defense are specially pleaded or set out by way of recoupment or as a bar to so much of the demand as may be thus answered." (Tr. 124, 125).

There is no plea setting up a lack of consideration or a partial failure thereof, except that in Paragraph 13 of the petition there is an allegation that "said contracts are null and void for the reason that they are without consideration and contrary to public policy and are further null and void because they operate as a fraud, upon this plaintiff and her rights as the widow of the deceased." (7).

We repeat that such plea does not set up a partial failure of consideration. That the court asserts no more than a partial failure. That in fact there is no failure either total or partial; and that if that were not so there was such lack or partial lack in every case wherein survivor rights were enforced, as that one can not understand how the numerous decisions enforcing such rights ever came to be made.

This assertion of impossibility is but a repetition of the assertion that no contract can operate to deny this widow a distributive share. If there be no such impossibility the argument falls with the premise. If there be such difficulty, we repeat one can not understand why it was not present in every case where surviving rights were enforced, and why there ever was such enforcement.

PART 1-L.

There is a Federal question because the court departed from its settled holdings, that personal property might be disposed of by either spouse absolutely at pleasure. The departure is holding now that personality consisting of a survivorship interest in future accumulations in an insurance business, cannot be disposed of so as to cut off dower right of the other spouse.

This involves a departure from what was ruled in such cases as that of Haines, 330 Iowa, 516; Carruth, 128 Iowa, 123, and Stahl, 72 Iowa, 720. And it also involves a departure from the construction of Section 2436 of the Code of Iowa, which was made in the Samson case, 67 Iowa, 252, and in which case it is expressly held that while that Section gives the surviving widow a distributive share in the personal property of which her husband dies seized, that yet during his life she has no inchoate right in his property and he may dispose of it during his life as he sees fit, and if he sells or makes other disposition which divests him of ownership, she has no claim after his death; and holding further the law has placed no restriction or limitation on the power of the spouse of making such disposition of the personal property as he may elect.

And the court held in the case of Lunning, 168 N. W. 140, that the power to dispose of personality is absolute.

And it so held in the cases of Langworthy, 46 Iowa 64; McDaniel, 55 Iowa, 312; Mallory, 71 Iowa, 63, 64; Paige, 71 Iowa, 318. It seems to be immaterial with what intent the husband parted with such property—Metler, 19 N. J. Eq., 457. And in the case of Burgoon, 121, Iowa, 78, it was held that the share of the widow in personal property cannot be enlarged by treating property parted with by the husband by way of advancement to children, as being still part of the personal property of which the husband died seized.

There was also a departure from *Baker v. Syfritt*, 147 Iowa, 49, wherein there was construed an Iowa statute enacted before these contracts were made; the construction was that such contracts as this were valid as to Charles, and binding on plaintiff. And see Vosburg, 155 Iowa, 165, and Haulman, 164 Iowa, 471.

The court does all this though it declares: "We are not unmindful that during the lifetime of decedent there was no legal impediment to his disposing of his personal property." (Tr. 115.) The only explanation attempted is that while decedent could have sold in his lifetime, he did not sell and that while he might have transferred "perhaps even without consideration," he did not transfer. (Tr. 115).

PART 1-M.

It is not a sound differentiation from other decisions of the court, that the contract of survivorship was between husband and wife. It does not matter who the parties to a survivorship contract are, or that the wife is one.

The fact that in *Stewart v. Todd*, the survivorship contract was between husband and wife and that it was sustained as cutting off inheritable interest against com-

plaining heirs is a distinction without a difference. When the husband dies seized of nothing there can be no dower rights created by the fact that the wife rather than heirs are complaining. Statute law creates dower rights and also such rights as heirs have. No statute supplies a power that does not exist. If a survivorship agreement defeats an heir because such contract works that there is nothing to inherit, the same contract defeats dower because there is nothing for dower to fasten upon. If a survivorship agreement gives all to the survivor, then if one party die too soon, the result is that against all the world the decedent dies seized of nothing. In that case it can make no difference that the attack is made by heirs and not by a wife. The contract works that there is nothing for either wife or heirs.

The question in the Stewart case was not whether a wife could have dower if her husband died seized of nothing, but whether a contract of survivorship, no matter who the parties were, might work, through one party dying first, that he had no estate at the time he died. The fact that in the Stewart case the contract was between husband and wife is purely adventitious.

It follows that the decision now in review is a pure oscillation. No other decision holds that despite a survivorship contract the spouse of one who dies first has anything whereon to fasten dower. The Supreme Court of Iowa held the contrary earlier than the decision at bar and, as seen, held it later in the Stewart case.

(See Black, *Judic. Prec.* 463, 565.)

PART 1-N.

Though the court asserts that it looks to substance and not to form it stresses the fact that at one time the signers made abortive attempt to evidence the accumulations of the joint enterprise by shares in a corporation formed by the signers which at most amounted to a change in the form of evidencing such accumulations.

It appears that a number of stock certificates in Fleming Bros., Incorporated, have been cancelled. They were issued in the names of the four brothers and carried in those names up to the time that Charles died. The issue was one-fourth of the total stock to each brother. (Tr. 35, 41). After Charles died, to-wit, and about April 12, 1916, these four stock certificates were cancelled and a similiar amount was issued in lieu thereof, but this time to the three brothers as survivors. (Tr. 35, 40, 41, 47).

It appears in the testimony of Robert J. Fleming, that the four certificates were cancelled and the three reissued "in the names of the three survivors." (Tr. 40.) That they "were issued to the three surviving brothers by name," "Or the survivor or survivors of them jointly and not as tenants in common" (Tr. 40, 41); that the purpose and object in assigning the older certificates in blank was done by Robert J. "to deliver the stock to the survivors of this survivorship contract agreement" (Tr. 38); that he and his brothers (all three) "took advice on the subject at or about the time the thing was done," and did so "when they were all together"; that, "it was done when the first stock was issued"; and witness thinks they "consulted Mr. Guernsey" (Tr. 38); and he adds that he knows "there was no other reason." (Tr. 38, 39.) The witness Stanhope Fleming testified that the reissue was "made payable to the survivors or survivor, without the assignment on the back." (Tr. 48.) The forms appear at Tr. pp. 35, 36, 37.

The court says "we are not concerned with forms. We look to the substance of the property rights of this decedent." (Tr. 118). Yet it is stressed that the four brothers created a corporation of which they were the sole share holders, that each received his pro rata of the shares and that, thereupon each purported to transfer his shares by endorsement and delivery.

Form is not disregarded, because the court holds that what was so done with reference to the issuing of shares in the Fleming Bros. Corporation is matter of substance, and that therefrom it results that Charles, at his death, left an estate to which the plaintiff's right of dower could and did attach. This, though plaintiff declares over and again that said corporation and the said shares were and remained the property of Fleming Bros. an alleged partnership; and therefore that her husband died seized "of an individual interest in all the property of the partnership, which partnership property includes all the capital stock and property," of said corporation. (Tr. 2, 3, 7, Par. 15).

Though it asserts it is not concerned with mere form it admits that:

"The property still remained in the dominion of the same parties. Its benefits still accrued to them. No fifth party had acquired interest or encumbrance thereon. * * * If they had then attempted a partition as between themselves each would have received his one-fourth thereof." (Tr. 119.) "That there was no transferee and therefore: at this point we are not concerned with forms. We look to the substance of the property rights of this decedent. Though in form he transferred all his property to the corporation, he was a joint creator of the corporation and owner of one-fourth thereof. Though each of the four transferred his stock in severalty to all of them jointly, and thereby changed the form of his property right, he still owned the substance thereof." (Tr. 115).

It seems to us that the creation of a corporation and the said dealing with its shares was nothing but a change in form—and that this corporation and said dealing with its shares was simply substituting shares for the property that belonged to the last survivor under the agreement between the four brothers—that the case stands precisely as if those who owned, say, a stock of goods, formed a corporation, became its owners and thereby the owners of its shares—a mere change of form in property from goods to shares.

Creating the corporation and so issuing and dealing with the shares is nothing but a change of form. If four partners conclude to symbolize hardware owned by the partnership by stock certificates issued to the partners, the rights of each in the hardware remains unchanged. The share certificate represents the hardware.

For one illustration: Plaintiff herself pleads that the Fleming Building in Des Moines and other real estate is a part of the assets of Fleming Brothers, Incorporated. The interest of decedent in said property being evidenced by his certificate of stock in Fleming Brothers, Incorporated, in the amount of Twenty-five Hundred shares. (Tr. 3).

In no view was more change effected in partnership rights than if it had retired from business and put all the accumulations therefrom into government bonds. All that was by possibility accomplished is that a share in business accumulation became a share in government bonds.

And the court inquires, "to whom did he endorse and to whom did he deliver," it declares, "there was no transferee and no taker of delivery, they all put their shares into a common receptacle and locked them in a safe to await eventualities." This can mean nothing except a strong intimation that no delivery of the shares was effected. As-

suming that to be so, surely the dealing with the shares is immaterial. If the shares were never delivered, nothing was ever done to change the property rights that each had before the corporation was formed or a share was issued.

PART 1-O.

The decision by the Supreme Court of Iowa turns largely upon a holding that the contracts at bar fail because in some way each one of the signers failed to invest each of the other signers with a full title. This, though the very essence of a survivorship agreement, is that there shall be no investment of a complete title in anyone and until such time as a last survivor exists.

The court seems to require for the sustaining of a survivorship agreement that each contributor to the joint venture must vest such title as he has or ultimately may have in each of the other parties to the contract, and that it is an insufficient disseizin and vesting to vest no title except that the last survivor shall have complete title of what property exists when he becomes such last survivor. And as it is the very essence of survivorship contracts that no one shall be vested with complete title until there is a last survivor, and as that is always the state of the title in such agreements, every decision that ever sustained a survivorship contract, therefore, erred, on that theory. The court says: (114)

By a series of instruments the four conveyed their legal title to a corporation organized by themselves as exclusive stockholders. Each received his pro rata number of shares of stock. Thereupon each purported to transfer his shares by indorsement and delivery.

To whom did he indorse and to whom did he deliver? There was no transferee and no taker of delivery. They all put their shares in the safe to await eventualities.

The property still remained in the dominion of the same parties. Its benefits still accrued to them. No fifth party had acquired any interest in or incumbrance thereon. The property rights of the four respectively, whether legal or equitable, were mutual and exactly equal.

If they had then attempted a partition as between themselves, each must have received his one-fourth thereof.

Assignment as to the comparative shares, it appears was made by endorsement in blank. (Tr. 44.) This assigning was done on the day the shares were issued. (Tr. 37, 42.) And the stock so assigned in blank was put into an envelope. (Tr. 38.) Included was 1250 shares to Charles, assigned by him in blank. (Tr. 36.) All were put into envelopes. (Tr. 37, 38, 39, 40, 41.) These envelopes were accessible to each of the brothers. (Tr. 41, 42, 46.) The envelopes were put into a drawer in a safe to which all had access. (Tr. 39, 42, 43, 44, 46.) They remained in this receptacle and were there at the time Charles died. (Tr. 46.)

The sum of the argument on lack of delivery, the retention of joint possession, and the preserving equal access to each partner is that, somehow, this suit is affected by lack of disseizin of one contracting party, and by failure to deliver to and vest in the other party, and that there is fatal uncertainty as to where title is lodged. It is an argument that has made much bad law, on so-called contingent remainders.

The court ignored the law of contingent remainders under which there may be a vesting for some purpose in a class, though at the time when the remainder is created no one can tell who, if any one, will be in that class when the time for distribution comes. It should have been held that if vesting be necessary that here was a sufficient vesting, to-wit, an inchoate vesting, in that, someone ultimately shall have full title; that though there was but inchoate

title the one who died too soon died seized of nothing and, therefore, had no estate upon which dower rights could be fastened. In the language of *Wood v. Logue*, 167 Iowa, 436, 443, the last survivor becomes the sole and unqualified owner and that the one who dies first has nothing when he dies. He fails to get an estate. He merely departs from his estate at his death. And see Cyc. pp. 901, 902, 1891, 1895, 1896.

One can contract as to what shall be done after he dies, McKinnon case, (C. C. A.) 56 Fed., 409; *In re Neil*, 71 N. Y. Supp. 840; Page, Cont., par. 397.

On the reasoning of the court, what the courts have held as to contingent remainders is bad law, and there is no defending such decisions as that in *Woodard v. Woodard*, 184 Iowa, 1178, and the numerous decisions therein cited in support. In the *Woodard* case it was contended that when the will was executed it could not be known what great-grandchildren would be in being when the time for ultimate transfer and vesting arrived, and that therefore the remainder was a contingent one. The court announced that when said will was executed, named great-grandchildren were in being, with present capacity to take; that therefore, though it could not then be known that any of these great grand-children would be living when the life estate in the grandchildren lapsed, or that later born ones would not then be *in esse*, yet the remainder was vested; and that—

“Unless something not yet discussed avoids it, the great-grandchildren took title on the day the testator died.”

The effect is that there was a vesting in the class known as great-grandchildren though no one could tell

who, if anyone, would be in the class when the distribution came.

On this line of decision it follows title was sufficiently vested in each of the brothers, because it was agreed that one of the four in their class should some time have full title; and the fact that it could not then be known which one in the class would be such ultimate beneficiary does not prevent a sufficient vesting of title in the class.

It is not unknown in the law that title vests even though full use and enjoyment be postponed, and even though it may not, at the instant when title is said to vest, be known with definiteness who will ultimately have full title.

The uncertainty as to who will be the owner or beneficiary was a difficulty which was present also in the cases wherein such contracts as this have been held to be valid. In *Wood v. Logue* and *Stewart v. Todd*, it was as uncertain who would get full title by becoming the last survivor as it was uncertain at the time the contract at bar was signed which of the four would live the longest.

At another point the court deals with nomenclature as it does not deal with it elsewhere.

The character of the title held by these defendants is the subject of our investigation, and controls the rights of this plaintiff. (Tr. 93.)

It will be noted that in the first two writings no direct provision is made for the vesting of the title to accumulated property in any designated entity or person.

It is now assumed by these defendants that it vested in the brothers as joint tenants.

No estate in the tangible property that accumulated as a result of the business enterprise is by express provision vested in any person, persons, or entity. Therefore, we turn to the third writing for further light as to the purpose and intent of these parties, and the status created by preceding writings. (Tr. 96.)

The title to property that can be the subject of ownership, we must assume, vests in some one, whether it be an individual, individuals, or a legal entity.

This property, when it came into existence, vested in these brothers. They became vested with the title as joint tenants, or they became vested with the title as tenants in common, or they became vested with the title as a copartnership. (Tr. 93.)

To be sure, it is settled that title to property subject to ownership must vest in someone, an individual, individuals, or a legal entity. But it is irrelevant, especially where it is also said that this property when it came into existence vested in these jointly, and that they became vested either as joint tenants or by placing title in a corporation.

If vesting be essential the parties to a joint tenancy or to a survivorship agreement have such vesting as is essential in that relation.

For the purpose of joint tenancies there is sufficient vesting if each has the same interest created by the same act or instrument, to vest at one and the same time, when the time for vesting does come, and each has the entire possession of every item of property held in joint tenancy as well as the whole. Park, Dower 37; Scribner, Dower, 269; 4 Kent, Com. 37.

While as a fiction of law each joint tenant holds all the property at all times, and that, ordinarily, there can be no recovery because the joint tenant uses all the property or its usufruct, 23 Cyc. 490, B. 491 D—on the other hand, one tenant may maintain assumpsit against the other to recover his share of the property or its proceeds. *Stone v. Aldrich*, 43 N. H., 52.

In *Allbright v. Hannah*, 103 Iowa, at page 192, the contract was that the plaintiff should

have certain lands upon the death of one Remey, or when Remey and his wife were done with it, and it was said that this "was either the present transfer of the fee, subject to a life estate, or an agreement to will the property to the plaintiff," and that whichever it may have been, "it was good if plaintiff accepted it and acted thereon, and took possession of the land thereunder." This may not fit the present discussion with absolute exactness, but it does settle that for the purposes of sustaining survivorship contracts, that, may be deemed a present transfer of the fee which for some purposes is not deemed to be such transfer.

It is not straining to say that if vesting and divesting were material, each here was so divested and each other so invested, as that the title remained inchoate in the four until three had died, and that then full title vested in the survivor.

The court departed from its holding in *Albright v. Hanna*, 103 Iowa, 192, wherein it is ruled that for the purpose of sustaining survivorship contracts there may be sufficient transfer by conveyance when for some purposes such would not be deemed such transfer.

And it departed from its holding in *Baker v. Syfritt*, 147 Iowa, 49, in holding that a disseizin or delivery or vesting from and by and between each of these four was essential to the validity of the agreement into which they had entered.

It was error to hold that, say, the depositing of said stock by each of the four and the assignment by each in blank did not amount at least to a constructive delivery to the joint tenancy.

There is title in all the parties subject to the contract limitation that the last survivor shall have sole title.

Can it be possible that a contract of survivorship wherein several agree that the one last remaining alive shall have all the property of the others is in any way affected by delivery, disseizin, and vestiture. If that be so, it is inexplicable why a survivorship contract was ever upheld. For in each and all the cases of such contracting no party was disseized, no party was vested with title to what he did not already own; and neither party delivered anything to the other except the contract itself. In each and all of such cases each contracting party kept full control of and access to the individual property of his that had been made the subject of the contract. In each of them it could have been said, "There was no transferee and no taker of delivery". And what an absurdity it would be to require mutual delivery in such cases. A. owns 10 horses; B. also owns 10. Can they make no effective agreement that the survivor shall have all that remain of the 20 unless when the parties sign each delivers his 10 horses to the other? To follow that to its end, the moment the exchange was made it would seem to become necessary to keep on transferring and retransferring. Must one who puts his farm into a survivorship contract deliver his farm at the time when he executes the contract?

In the supposed case of the contract where each party has 10 horses, will it invalidate the contract because both parties had free access to both sets of horses and, for that matter, if they both had control of both sets.

In *Stewart v. Todd*, the general store case, not an item of the stock was ever delivered into the sole control

or possession of either party to the partnership contract. Every item was at all times as much under the control and in the possession of one partner as of the other. There was not a moment when one party did not have equally full access to everything belonging to the partnership; the benefits of the existence of the general store "still accrued" to both contracting parties; in the Stewart case, as here, in the sense that the court uses the words here, "there was no transferee and no taker of delivery." (Tr. 120.)

In the Stewart and in all like cases, just as here, the property "still remained in the dominion of the same parties," if the partners had attempted partition as between themselves, "each must have received his one-fourth thereof." There, as here, no party other than the ones contracting "had acquired any interest or incumbrance thereon"; as here, in all cases where there is a contract of survivorship in the sense the words are used by the court, "they all put their shares in a common receptacle and locked them in the safe to await eventualities." That is to say, in the Stewart case the joint property was kept in a common receptacle, the partnership store, and kept there even as things are kept in a safe, to await eventuality, the death of one partner, on the happening of which the property would be removed from the common receptacle where it was constructively locked up and be given to the survivor.

If divesting and vesting be essential, there was the same flaw in every case wherein in spite of such flaw survivorship contracts have been upheld.

No survivorship contract should ever have been upheld if here is the true theory, because not one could meet the test now formulated.

The very essence of such a contract is that benefits and dominion shall be temporarily retained with access and control, and that the final vesting of title must wait the happening of the contracted-for eventuality.

The court holds the contracts at bar may be avoided because there was no disseizin from one of the four in favor of either of the others; that such disseizin or a delivery or a vesting from each to the other was essential, holds it to be material that the tangible property accumulated was not so vested; that no estate in which tangible property accumulated as results of the business enterprise was vested in any person, persons, or entity, by express provision; that the rights of plaintiffs in error are affected by a failure of each or either to deliver and vest or to effect disseizin for each of the others; that for the purpose of this suit it is to be assumed that title to property which can be the subject of ownership must vest in someone, either an individual, individuals, or a legal entity; that for the purposes of this suit any property that can be the subject of ownership must be assumed so to vest; to be material, that the property here at all times remained in the dominion of the four brothers, and in that of the three after the death of Charles; to be material, that the benefits of said property still accrued to the same parties, that no fifth party ever acquired an interest in said property or an encumbrance thereon; to be material, that had the four at any time attempted partition, each must have received his one-fourth of the corporate property or stock; to be material, that there was no transferee; to be material, that there was no taker of delivery; to be material, that there was no delivery of the corporate stock made; to be material, that it cannot be told to whom Charles made endorsement of the

corporate stock; to be material, that the four all put their shares into a common receptacle and locked them in a safe to await eventualities; to be material, that each and every item of property was at all times under the control and in the possession of one partner or joint venturer as much as in that of the other.

All this proves too much. It would be immaterial if the record showed that it exists. If though true these things are material and their absence or presence avoids survivorship contracts, it cannot be explained how a survivorship agreement was ever sustained by the courts. In many, if not in all the decisions sustaining such contracts the tangible property accumulated was not vested by each of the parties in each of the others. In many, nay in most of these decisions, there was no express provision in the agreement vesting what is accumulated in any person, persons or entity; in all of them there was a failure of each to deliver and vest in and to make disseizin to each of the others, nor a vesting in an individual, individuals, or in a legal entity. Can it be possible that if two men pool their individual ownership of horses with agreement that the survivor should have whatever was left of the horses after the joint venture with them had ended, that such an agreement could be avoided because the owner of one set of horses failed to vest his title in the other and that the second failed to vest his title in the first. Could such an agreement be avoided because the first set of horses was not delivered over by the owner to the other venturer, and that the other did not deliver his horses to the first. The very essence of such arrangements is that the title shall not be vested finally in any one until there is a last survivor.

In the multitude of decisions sustaining survivorship agreements the property involved did not at all times re-

main in the dominion of each party to the contract, nor in three survivors where the fourth pre-deceased. In the Stewart case, certainly, the property involved did not at all times remain in the dominion of the two parties to the agreement. Each had as much dominion as the other and neither one complete dominion until he became the survivor. Take next the argument that the contracts at bar are avoided because the benefits of the property involved still accrued to the same parties, that no fifth one ever acquired any interest in the property, and that if the four at any time attempted partition each must have received his one-fourth of the corporate property or stock. If that avoids the contracts here, it is difficult to understand how a survivorship agreement was ever judicially sustained. It is safe to say that in all such agreements the benefits of the property involved remain in the same parties and that no outsider gets an interest therein, and if there were partitions each of the signers would get his share. This would remain true until there was a last survivor. If material here it was so in all such decisions, and yet such decisions were made. In the decisions sustaining survivorship contracts there was no more transfer than there was in the illustration as to the two sets of horses. In the decisions sustaining such agreements there was no delivery as between the signers any more than in the illustration of the horses, or in the Stewart case. There was no time when either of the Stewarts delivered any property to the other. The very essence of survivorship agreements, as seen in the horse illustration, is that there shall not be delivery as between the contracting parties until it occurs when the last survivor comes into existence. How can the fact that the four brothers all put their stock shares into a common receptacle and locked them in a safe to await eventualities avoid their contract.

In the Stewart case the property was kept in a common receptacle, to-wit, the store, and it was kept there to await eventualities, to-wit, the death of one party. That did not keep the Supreme Court of Iowa from sustaining the agreement between the two Stewarts. How is it material that the property here at all times remained under the control of the four; that every item of property was at all times under the control and in the possession of one party as much as in that of the other. In survivorship agreements there never is a time when every item of property is not under the control and in the possession of all signers; this is so until there is a last survivor. There is not a moment either when each party has not equal access to what belongs to the joint enterprise, and in which the benefits will not accrue to all contracting parties until the time comes when one party dies.

The court proves too much:

The very essence of such contracts is that benefits and dominion shall be temporarily retained with access and control, and that vesting of title is deferred.

The very essence of such contracts is that the final vesting of the title must wait the happening of the contracted for eventuality. In all of them there is title in all the parties subject to the contract limitation that the last survivor shall have full title.

Can it be possible that a contract of survivorship wherein several agree that the one last remaining alive shall have all the property of the others is in any way affected by delivery or lack of it, disseizin and vestiture.

If that be so, it is inexplicable why a survivorship contract was ever upheld. For in each and all of them no contracting party was disseized, no party was vested with title to what he did not already own, and neither delivered anything to the other except the contract itself.

In each and all each contracting party kept full control of and had access to the property of his that had been been made the subject of the contract.

In each it could have been said "there was no transferee and no taking of delivery."

In all cases there was the difficulty of saying who would be the ultimate owner or beneficiary.

In *Wood v. Logue* and in *Stewart v. Todd*, it was as uncertain as here as to who would get full title by becoming the last survivor.

In the *Stewart* case, as here, it was true that if the parties had attempted partition as between themselves "each must have received his contract specified share thereof."

In the *Stewart* case the benefits of the existence of the general store "still accrued" to both contracting parties.

In the *Stewart* and in all like cases the property "still remained in the dominion of the same parties."

It was true in the *Stewart* case, also, that no party other than contracting ones "had acquired any interest or incumbrance thereon."

GRAND DIVISION TWO.

THIS CASE RAISES A FEDERAL QUESTION BECAUSE THE SUPREME COURT OF IOWA IN REACHING THE CONCLUSION THAT THE CONTRACTS AT BAR DID NOT AFFECT THE RIGHT OF DOWER DEPARTED FROM ITS FORMER DECISIONS AND CONSTRUCTION OF STATUTES AND IN SUCH WAY AS TO AFFECT THE CONTRACTS AT BAR RETROACTIVELY—THUS VIOLATING THE CONSTITUTION OF THE UNITED STATES AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

PART 2-A.

While it is the general rule that the courts of the United States will follow the latest settled adjudications by the court of last resort of the State, and especially where that court has done nothing but construe a state statute, and while the Federal courts will in certain cases follow such latest adjudications even where they work a reversal of former decisions on part of said state court—there is a settled exception to this general rule—which exception has been most numerously affirmed.

Among many others we cite:

- Douglas, 101 U. S., 677; Loeb, 79 U. S. 472.
 Taylor, 105 U. S., 72; *Trust Co. v. DeBolt*, 16
 How. 425.
 Anderson, 116 U. S. 356, 6 Sup. Ct., 413; U.
 S.; Lamson, 76 U. S. 485, 486.
 Gelpke, 1 Wall. 194; Burgess, 107 U. S. 33, 34.
 Havemeyer, 3 Wall, 294; Mitchell, 4 Wall. 270
 (Citing Gelpke.)
 Rigg, 6 Wall. 106; *Lee County v. Rogers*, 7 Wall.
 181.
Chicago v. Sheldon, 9 Wall. 50; Olcott, 16 Wall.
 678.

Talcott, 86 U. S. at 678; *Wade v. County*, 174 U. S. 499.

Green, 109, U. S. 104; Butz, 75 U. S. 575.
Township v. Aetna Life, 138 U. S. 215, 216.
Groves v Slaughter, 15 Peters, 449.

This exception has been enforced as to contracts.

Rowan's case, 46 U. S. at 38, 39.
Ohio Life Co. v. DeBolt, 57 U. S. at 431, 432.
 Olcott's case, 83 U. S. at 690.
 Douglas Case, 101 U. S. 686 (contract rights).
 Burgess case, 107 U. S. at 33, 34.
Pleasant Twp. v. Life Co., 138 U. S. 67.
 Wade's Case, 174 U. S. 499.
 Loeb's Case, 179 U. S. 472.

The Loeb Case, 179 U. S. 472, 21 Sup. Ct. Rep. at 182, declares that the decisions affirming this exception were so numerous "that any further discussion of the question is unnecessary and we need only cite some of the adjudicated cases."

This exception has been applied to commercial paper.

Douglas 101 U. S., 731, 732.

In the case of Loeb 179 U. S. 472, 21 Sup. Ct. Rep. at 182, this court declared the court below to have held it to be its duty to enforce the provisions of the constitution of Ohio as interpreted by the Supreme Court of Ohio at the time the bonds were issued, and not to permit contrary decisions until after the issue of these bonds, to have a retroactive effect. This court declares that this holding below was in accordance with the long established doctrine of the Supreme Court to the effect that on a question of the power of a municipal corporation to make negotiable securities, the Federal court will determine that to be the law what was judicially declared by the highest

court of a state when the securities were issued, and that the rights and obligations of the parties accruing under such a state of the law may not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation.

PART 2-B.

That in the case at bar there is such impairment of contract and contractual rights as raises the Federal question through change in decision and construction of statutes, is demonstrated by the extension of the rule of the Gelpke case which the later cases have accomplished.

In the case of Muhlker, 197 U. S. 544, 25 Sup. Ct., 522, it appears that one time the Court of Last Resort of New York held that damages were recoverable where an obstruction impaired the easements of air, light and access. Muhlker, by a chain of conveyances had a covenant in deed by his remote grantor which covenant could reasonably be construed to give to and preserve for all grantees in the chain the easements of air, light and access. Defendant raised its tracks in such manner as to impair those easements possessed by Muhlker. On suit by Muhlker said New York Court of Last Resort denied damages. It reverses its said earlier decision to which Muhlker was no party. It declares that reflection and research have convinced it that the earlier decision was unsound. Muhlker appealed to this court, and it said:

"In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared in so far as its expressions concerning rights of abutting property owners are concerned, to have been improvidently decided and the elevated railroad cases which were made its support were distinguished."

The Supreme Court says another distinction made in the Muhlker case below is that the act of the railroad was the act of the state. It answers this claim by saying, "but this defense was made in the Lewis case, and it did not give the court much trouble" (527).

It adds: That the court below rests itself on the one proposition that the command of the Act of 1872 was beneficial to the public; that it made the state the builder of the new structure and its use by the railroad mere obedience to the law. It answers this claim by saying it does not follow that private property can be taken either by the erection of a structure or its use, and that this was plainly seen and expressed in the Lewis case as to the use of the structure; that when the Lewis decision was made, "there was no hesitation then in marking the line between power of the state and the duty of the railroad and assigning responsibility to the latter," and that this was in accordance with principle. (524)

The court continues that plaintiff urges the contract clause of the Constitution, also the Fourteenth Amendment, invoking the latter because the Act of 1872 does not provide for compensation to property owners, and the first, on account of the condition upon which the strip of land constituting the avenue was conveyed to the city. It is then said:

"The details of these conditions we need not repeat (524) nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is, therefore, presented to us as to the effect of the deed of Poillon to the plaintiff and to the city, as constituting a contract; and the effect of the Act as an impairment of that contract, or as taking plaintiff's property without due process of law.

The court concludes with the statement that these questions were directly passed on and negatived by the Court of Appeals in the Lewis case. (525)

PART 2-C.

This exception had been applied to matters other than those heretofore enumerated herein.

In the Muhlker case, 197 U. S. 544, 25 Supreme Court 522, the remote grantor of plaintiff had conveyed to the City of New York with certain reservations which are construed to retain the easement of light, air and access—and it was held that a change in decision from one holding that damages were due for impairment of these easements, was such change as created a federal question.

This decision has been often referred to but as yet has never been criticized.

It is one holding of the Gelpke case:

“That where by a series of decisions of a court of last resort of a state the right to give legislative authority to subscribe to railroads and to issue bonds thereon was settled in favor of the right, these decisions being in harmony with the weight of authority will be regarded as a true interpretation of the Constitution and laws of the state so far as related to bonds issued and put upon the market during the time that those decisions were in force—and the fact that the same court now holds that those decisions were erroneous and ought not to have been made and that no such power existed as the former decisions decided did exist, can have no effect upon transactions in the past, however, it may affect those in the future.”

Miller, J., dissenting in the Rigg's case (73 U. S. at 202) says:

“The next step was the decision of the Gelpke case in which the court held that the later decisions of a state

court on the construction of its own constitution, although unanimous, would be disregarded in this court, in county bond cases in favor of earlier decisions made by a divided court."

In *Havemeyer's case*, 70 U. S. at 303, it was said:

The court can look only to the condition of things which subsisted when the paper was sold, and that so holding brings the case within the rule of *Gelpke's case*, which is stated to be that if a contract when made was valid by the Constitution and laws of the state as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair the obligation—that this rule was established upon the most careful consideration and the court thinks it rests upon a solid foundation and feels no disposition to depart from it.

In *Lee County v. Rogers*, 74 U. S., 183, 184:

The *Gelpke case* is construed to hold that if at the time bonds were issued the validity of that class of bonds was upheld by the settled adjudications of the highest court of the state, a reversal in those decisions denying that validity will not be followed by the federal court.

In the *Gelpke case*, 1 Wall. 175, the court said:

"Although it is the practice of this court to follow the latest settled adjudications of the state courts giving construction to the laws and Constitutions of their own states, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice and law."

PART 2-D.

A full statement of what the scope of said exception and the reasoning upon which it rests, follows below.

Such contract and bonds have been held to be valid upon the principle that the holder upon purchasing such

bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the state. To have held otherwise, would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their only security. (Among others the Gelpke case is cited.)

It is held in the Burgess case, 107 U. S. at 33, 34, that when contracts and transactions have been entered into and rights have accrued thereon under a particular state of decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case although a different interpretation may be adopted by the state courts after such rights have accrued. This exact pronouncement is approved in *Pleasant Turp. v. Aetna Co.*, 138 U. S. 67, 11 Sup. Ct. Rep. 217.

In *Loeb v. Trustees*, 179 U. S. 472, 21 Sup. Ct. Rep. 174, one syllabus point is this:

"The Federal Courts in determining contract rights as affected by a state Constitution, will enforce the contract in accordance with the Constitution of the state as interpreted at the time the contract was made by the highest court of the state, without regard to a contrary interpretation made by such court after the contract was made."

The court says:

"Our decisions to that effect are so numerous that any further discussion of the question is unnecessary, and we need only cite some of the adjudicated cases." (182)

In Anderson's case, 116 U. S. 356, 6 Sup. Ct. Rep. 415, 416, it is held that the rights of the purchasers or holders would not be affected by a subsequent change of decision, because it is the long-established doctrine of the

Supreme Court from which, as was recently said in Greene's case, 109 U. S. 104, 3 Sup. Ct. Rep. 69, the court is not disposed to swerve—that where the liability upon negotiable securities depends upon a local statute the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued.

It is true, after the state court had been accorded a *locus penitentie*, after the counties had lost in the Federal Supreme Court by following the state court, and after the bonds in question had entered into circulation as commercial paper on the faith of its prior rulings, the light of a new revelation fell upon it, and it discovered the unconstitutionality of the said act of 1868 and the validity and virtue of the act of 1861. But the mischief done was then incurable. The Supreme Court of the United States refused to follow these later decisions of the state court on the well-established rule that the contract, as respects commercial paper, should be enforced according to the construction put upon the local statutes by the local court at the time the contract was made or the bonds went upon the market.

In re Copenhaver, 54 Fed. at 664.

The Douglas case, 101 U. S. 687, declares the Supreme Court always regrets to find it is in conflict with the courts of states in matters affecting local law, but that when necessary it can not refrain from acting on its own judgment, unless it were willing to abrogate its constitutional jurisdiction.

In *Anderson v. Township*, 116 U. S. 356, 6 Sup. Ct. Rep., 416, the result of this reluctance is a declaration that for the sake of harmony the Federal Court will lean to the construction of the state court "if the question seems to be balanced with doubt."

But where the court feels clear, it will not follow a construction of the state court. This, on the reasoning that if comity to state decisions were pushed to that

extent it is evident that the constitutional provision which secures to the citizens of another state the right to sue in the courts of the United States might become utterly useless and nugatory.

Rowan v. Runnels, 46 U. S. 139.

In the Douglas case, 101 U. S. at 686, 687, the court says it approves this statement of the Rowan case, and adds that non-interference with retroactive decisions affecting the obligation of bonds or contracts is prohibited by the Constitution—and

“The question presented, as we view it, is not so much whether these late decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they were announced.”

In *Ohio Life Co. v. DeBolt*, 57 U. S. at 432, the court says that the writ of error to a state court would be no protection to a contract if the Supreme Court were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision.

In the Wade case, 174 U. S. 499, 19 Sup. Ct. Rep. 718, 719, the theory of not following is put upon the ground that the earlier construction upon which action was had is to be deemed to always have been the proper construction, and therefore the one to be followed.

“The laws existing at the time of the issuance of the bonds, and under the authority of which they were issued, enter into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired or its fulfillment hampered or obstructed by a change in the laws (citing among many others, *Louisiana v. Pilsbury*, 105 U. S. 278.)

Moore v. Otis, 275 Fed at 751.

The Supreme Court thinks a right construction can not be taken away as respects previously existing contracts by judicial decisions of the state courts which construe the statutes wrongly.

Butz v. City, 75 U. S. 575.

PART 2-E.

The decision now in review is merely an oscillation in the course of judicial settlement attempted by the Supreme Court of Iowa, and despite the practice of the Supreme Court to follow the latest adjudications of state courts construing the laws or constitution of the state, it will not necessarily follow such oscillations nor follow any adjudication to such an extent as to make a sacrifice of truth, justice and law—*Gelpcke v. Dubuque*, 68 U. S. at 176.

What is the settled adjudication, or even the latest adjudication on the matter in hand. Is the decision at bar anything more than an oscillation in the course of settlement?

For years the Supreme Court of Iowa held that as to personal property either spouse had the full *jus disponendi*. This held, of necessity, that there was the right to dispose of it by entering into a joint survivorship agreement wherein the title was kept inchoate and away from any particular individual party until it was ascertained who was the last survivor. To this unbroken line of decisions was added *Baker v. Syfritt*, 147 Iowa, 49, which ruled that a survivorship agreement, including both land and personal property, was valid and enforceable. Then came *Wood v. Logue*, in the 167 Iowa, flatly approving such agreements. Then came the lone oscillation, to-wit: the instant case. It was almost immediately followed by *Stewart v. Todd*, 190 Iowa, 283, which flatly followed and extended the doctrine of the Logue case.

At this writing the Stewart case stands unquestioned by the Supreme Court of Iowa. It is possible there will be no further oscillations, and that the Stewart case will remain the final swing-back to the rule unbroken except by the Fleming decision. It may be that when this case is presented to this court the Stewart decision will then be the latest adjudication; as it surely is one that follows what for years was the settled adjudication.

PART 2-F.

There does not seem to be a single court of last resort decision which holds with the decision at bar. And that decision seems to be contradicted by the same court that pronounces the instant one.

That court said in Baker's case, 147 Iowa, at 62:

By Code, Section 3376, it is provided that the right to a widow's share shall not be affected by any will of the husband. But it must be remembered that unless the husband has at some time during the marriage relation held a heritable estate of some kind—legal or equitable—in the property in question, no right of dower could attach thereto in the wife's favor. The stream can not rise higher than its source. *Dunham v. Osborn*, 1 Paige (N. Y.) 634; *Pritts v. Ritchey*, 29 Pa. 71; *Apple v. Apple*, 38 Tenn., 348; *Edwards v. Bibb*, 54 Ala. 475; *Sullivan v. Sullivan*, 139 Iowa, 679.

The unbroken voice of authority is against the position taken in the case at bar. For illustration:

It is held in *Attorney General v. Treasurer*, (Mass.) 110 N. E.:

Where two sisters received property by conveyance as joint tenants, and also made deposits in a savings bank for their joint use and benefit, and purchased certain securities, which were issued to them as joint tenants,

their estate included the right of survivorship, and the estate in all the properties was a joint tenancy.

Upon the death of one joint tenant, the other takes the whole estate, not by descent as the heir at law of the other nor under the laws regulating intestate succession, but as the sole surviving tenant.

PART 2-G.

The earlier cases have been followed because of acquiescence and general understanding.

In *Township v. Talcott*, 86 U. S. 678, it is said: "And during the period covered by their enactment neither of the other departments of the government of the state lifted voice against it. The acquiescence was universal." (Citing the Gelpke case.)

Douglas v. County, 101 U. S. 686, speaking to an earlier decision, says: Other objections to its constitutional validity than those which had formerly been considered were raised, argued and decided in favor of the law. From that time forward and until long after the issue of the bonds in question, the law was treated by the courts and the people as valid and constitutional. No lawyer, asked for a professional opinion on that subject, could have hesitated to say that it had been settled.

Important that the general understanding of the legal profession throughout the country is believed to have been that they were valid. *Township v. Talcott*, 86 U. S. at 678.

It is important that conditions show the understanding of the bar and bench at the time of the later decision. *Havemeyer v. County*, 70 U. S. 303.

It has been held controlling that in earlier times and decisions no intimation was given by any department of the government that certain statutes were otherwise

than legal in their character. *Havemeyer v. County*, 70 U. S. 303—that no doubt as to validity had been expressed though the question had often been considered.

Douglas v. County, 101 U. S. at 679, 680, 681.

Validity of sales had not been brought into question in any of the tribunals of the state until long after the contract in question was made. *Rowan v. Runnels*, 46 U. S. 139.

Importance is attached to how, at the time the contract was made, the law as to that subject was expounded by all the departments of the government of the state and administered in its courts of justice. *Ohio Life Company v. DeBolt*, 57 U. S. 432.

Important it is that an interpretation was acted on as undisputed for any great lapse of time, and the construction the law received from the authorities of the state at the time when the contract was made. *Ohio Life Company v. DeBolt*, 57 U. S., 427.

A construction uniform and unquestioned by all the departments of the government for a long period of time must be regarded as the true one. *Ohio Co. v. DeBolt*, 57 U. S. at 431.

PART 2-H.

These plaintiffs in error are within said exception and have suffered a change in decision and judicial construction of statute such as entitles them to federal review.

There has not been any overruling by name of any case holding that such as the Fleming contract is a valid contract. But surely there is in the instant case a reversal of basic reasoning, rules and principles which, if followed to the logical conclusion, hold such contract to be enforceable.

The third contract was executed January 17, 1911. The Baker case was decided April 9, 1910. It said:

And where the will, as in this case, provided that the surviving testator should hold the same for life, and as such survivor the husband probated the same and enjoyed the benefits arising therefrom, he took simply a life estate, and a remarriage did not reinvest him with a heritable estate, in which his widow by the subsequent marriage could acquire a dower interest. (147 Iowa, 50.)

Again (62):

By Code Section 3376, it is provided that the right of a widow's share shall not be affected by any will of the husband. But it must be remembered that unless the husband has at some time during the marriage relation held a heritable estate of some kind—legal or equitable—in the property in question, no right of dower could attach thereto in the wife's favor. The stream cannot rise higher than its source. *Dunham v. Osborn*, 1 Paige (N. Y.) 634; *Pritts v. Ritchey*, 29 Pa.; *Appel v. Appel*, 38 Tenn. 348; *Edwards v. Bibb*, 54 Ala. 475; *Sullivan v. Sullivan*, 139 Iowa, 679.

Baker v. Syfritt, 147 Iowa, 49, undoubtedly construes Code Sec. 3376 and 3157 and No. 3154. It seems to be grounded on the thoughts:

1. That although a joint will creating a survivorship as between the makers, husband and wife, is revocable by the survivor, he takes nothing under it;

2. Is nevertheless valid as a contract, creating a trust if the survivor takes under it, and does not attempt to revoke it;

3. That remaindermen or beneficiaries of both testators will take to the exclusion of a surviving spouse of the survivor by a second marriage; on the broad ground that the effect of the will *operating as a contract* was that no estate of inheritance passed to the surviving husband, and that hence

4. The second wife surviving such husband, can take nothing since his estate if surviving contractor was not an estate of inheritance.

5. The husband and wife are put upon the same plane as any other contracting parties.

Caruth's case, 128 Iowa, at 123, filed April 6, 1905, holds:

The inchoate interest of one in the realty of the other ripens into a fee only by death. Not until the life of the owner has departed can it be material whether the interest of either husband or wife in the property of the other has been divested, and then only to determine upon whom the descent is cast, or to whom distribution shall be made. This statute, in declaring that the interest of the one in property of the other cannot be the subject of contract between them, in effect, directs distribution regardless of any such contract, and, as said, is a statute regulating the descent and distribution of property.

Samson v. Samson, 67 Iowa, 253, decided Oct. 22, 1885, holds flatly that while Sec. 2436 Code of 1873 gives to the surviving widow a distributive share in the personal property of which her husband *dies seized*, that during his life time she has no inchoate right in such property, and he may make such disposition of it during his life time as he sees fit. If he sells it or makes any other disposition of it by which he is divested of the ownership, the wife has no claim upon it after his death. The law has placed no restriction or limitation on the power of the husband to make such disposition of his personal property during his life time as he may elect.

Such cases as *Haines v. Harris*, 33 Iowa, 516, decided Feb. 24, 1871, under the same statute, and *Stahl v. Brown*, 72 Iowa, 720, decided March 5, 1887, hold expressly that the personal estate vests in the administrator during administration. "The heirs take no title to or ownership of

the personal property of the estate while it is subject to administration; but it descends to the administrator upon his appointment."

Vosberg v. Mallory, 155 Iowa, 165, on page 174, cites at length from the Samson case, *supra*, approves it and adopts the rule above quoted.

PART 2-I.

While, of course, a flat overruling of earlier decisions raises the Federal question, it is not essential that such overruling be done in terms, and not flatly.

In the Muhlker case the Supreme Court notices that the court below held that, "the decisions in the elevated railroad case are not in point; that there no attempt was made by the State to improve the street for the benefit of the public,"—and says that this is urged with increased assurance on the argument that it is the real ground of decision in the Court of Appeals. It replies:

"However, we need not go further than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation." (528) And this is the ground of our decision.

Further—

"And when there is a diversity of state decisions, the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the elevated railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of commercial advantage between

the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate.

We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted."

"We are not called upon to discuss the power or the limitations upon the power of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract, and have come under the protection of the constitution.

And we determine for ourselves the existence and extent of such contract." (528)

The state court did no flat overruling of earlier decisions, it but indulged in a flat repudiation of essential principles and rules formulated by the earlier decisions.

The conclusion that there has been such recession from earlier decisions as to raise a Federal question has been reached on many lines.

The recession had been found on arguing what the later decision did hold.

In *German Bank v. County*, 128 U. S. 526, 9 Supreme Court Reporter, 163, it is held that although a statute did not declare bonds of a certain kind to be void, its declaration that such bonds were not valid or binding until certain conditions precedent had been complied with was an imperative and peremptory declaration that they were invalid until such conditions had been complied with.

PART 2-J.

It is not controlling that the earlier and the changing case differ in respect to subject-matter or differ in some other respect.

In *Douglas v. County*, 101 U. S. 680, the earlier case is held to control, although it is said to be "quite true that

the precise objection which has since been raised was not then argued or considered, since the alleged discrepancy between the Act and the Constitution was just as apparent then as it is now."

In that case it is found not to be controlling that the bonds involved in an earlier case were not for the same purpose as the ones passed on in the changing case, where the law construed made provision for the issue of either of such class of bonds. And the same case holds it is not against the binding effect of an earlier decision that the language construed in it was not the identical language or the identical statute construed in the earlier case, if it was similar language found in another statute.

It holds that it does not work against the controlling effect of the earlier decision that objections other than those made in the changing case were in the earlier cases raised, argued, and decided in favor of the law.

In the *Copenhaver* case, 54 Fed. 664, the earlier case unlike the changing one, did not involve municipal bonds, but involved the State law taxing banks.

In the *Anderson* case, 116 U. S. 356, 6 Supreme Court Reporter, 415, it is held not to be controlling that the earlier case was not in every respect analogous to the one then in consideration by the court, where both cases involved action upon the same law principle.

In *Ohio Company v. DeBolt*, 16 How. 416, there is approved the declaration of the Supreme Court in the *Rohan* case, where Chief Justice Taney said for the court:

"It is true the language of the court is confined to contracts with citizens of other states, because it was a case of that description which was then before the court. But the principle applies with equal force to all contracts within its jurisdiction."

It is enough that the earlier case substantially decides what the later case repudiates. *Douglas v. County*, 101 U. S. 680, 681, U. S. Anderson's case, 116 U. S. 356, 6 Supreme Court, 416, 417. Or that the earlier decision in effect rules what the later reverses. It is not controlling that the earlier case deals with a statute having provisions. (Gelpke's case 68 U. S. at 203), that are merely similar.

PART 2-K.

What it all comes to is that a set of principles judicially declared may not be recanted in such manner as to have a retroactive effect upon rights accrued while those principles stood unrevoked.

In the Gelpke case 68 U. S. 205, 206, the Supreme Court says:

"The same principle applies where there is a change of judicial decision as applies to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

What is involved in cases like Gelpke is neither a square overruling nor a former adjudication, or the like. It is a holding that if it is ascertainable from analysis that a certain law principle has been declared, that principle will be applied in all subsequent litigation. For illustration, if the fair effect of an earlier decision is the declaration of a rule that certain things are valid or certain objections are bad, then whatever results from the fact that those things are valid or those objections are bad is available to any litigant.

In the *Gelpcke* case the opinion discloses the ultimate question to be "a question of power of a city to issue bonds for the purpose stated." Note the question is not whether some particular decision had been made in favor of the power nor whether a decision is attempting to reverse an earlier one which held certain bonds to be valid, nor whether the litigant at bar should prevail. The inquiry is whether a law rule or law principle declaring in favor of such power has been established. The litigant may have whatsoever in logic results from the evolution of that rule or principle. The inquiry is not limited to whether the same litigant has suffered from conflicting lines of decision. The true inquiry is whether his rights have been impaired because a later decision has receded from a principle which prevailed before such recession.

The *Anderson* case, 116 U. S. 356, 6 Sup. Ct. Rep. 417, bases itself on a "principle" that a legislature has power, if no vested right is interfered with, to enact retrospective statutes validating invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first instance. It speaks (415) of a Missouri decision as being one that did no more than "Give effect to principles announced by the state court prior to the issuing of the bonds."

The *Wade* case, 174 U. S. 499, 19 Sup. Ct. Rep. at 718, says:

"Such contracts and bonds have been held to be valid upon the principle that the holders upon purchasing the bonds or parties to such contracts were entitled to rely on the prior decisions as settling the law of the state."

In the dissent of Bartlett, J., in the *Muhlker* case (66 N. E. 562, 563) whose views were adopted by the Supreme Court, he speaks of a desire to record himself against a change from earlier decisions which change "adopts a prin-

ciple that is at war with the long line of decisions in the elevated railroad cases." He says that while the earlier case "does not present facts similar to the one at bar, yet the principle involved is precisely the same"—that principle being that municipalities could not under the guise of exercising the power to alter the grade of a street appropriate a part of the street, practically to the exclusive use of a railroad company, and cut off abutting owners, and without compensation, from using any part of it in the accustomed way. He speaks of the holding of one of the cases that departed from earlier decisions as a holding that the principles of law relating to the change of grade of streets when lawfully made were applicable here, and that the doctrine involved in the earlier decisions had no application.

In the Muhlker case the court speaks of the holdings of earlier New York cases as setting forth an illustrative set of principles which the instant case has repudiated.

PART 2-L.

The federal question may be raised by the repudiation of a doctrine when such repudiation works retroactively.

In Braun's case, 66 Fed. at 479, 480, there is spoken of as established what is termed to be a doctrine, to-wit: that gravel road bonds of the character considered do not create a general obligation of the county upon which an action may be maintained for mere failures to pay them at maturity, but only an obligation payable out of assessments of benefits when collected.

In the case of Copenhaver, 54 Fed. at 664, the exception to the general rule concerning the following of state decisions is spoken of as doctrine established, and established on precedents cited.

The Olcott case, 83 U. S. at 693, says that before certain county orders in suit were issued the state courts made expositions of the law applicable, and asserted the doctrine that aiding the building of a railroad was a matter of public concern, and was in such sense a public use as that though built by private corporations there existed the public right of eminent domain in their aid, and the power to tax in their aid.

What is involved is not the decision of a controversy between named parties or a judgment *in rem* fixing *status* against all the world. Neither identity of party or of issue are involved. Nor are we concerned with cases where between the parties it is determined, say, that the first of a series of bonds is valid, and that therefore all the others in the series are. As to none of the foregoing, is there invoked the rule of Federal review that we are dealing with, for in all of those illustrations rights are finally determined by *res judicata* or by the doctrine of estoppel by litigation.

The rule of Federal practice we invoke concedes that those earlier decisions are not *res judicata* as to any except those who are parties or privies, but that such earlier settlement of law rule or doctrine is available to all the world as a basis for objecting to a reversal of those law rules or precedents.

PART 2-M.

The Gelpcke and like cases do not involve former adjudication. They merely announce the law doctrine that reversals in judicial decision, while they may be prospective, may not be retroactive.

What the Supreme Court of the United States has affirmed was not that an adjudication between parties must stand but that:

"The sound and true rule is that if the contract when made was valid by the laws of the state as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of legislation or decision of its courts, altering the construction of the law."

In support it cites *Ohio Life Co. v. DeBolt*, 16 How. 432 a case which had nothing to do with either Gelpke or his bonds.

In the Gelpke case certain earlier decisions are referred to as settling a certain law rule as to the validity of a certain class of bonds. The bonds attacked in the Gelpke case and as to which the Iowa court reversed its earlier decisions affirming the validity of the bonds, were not bonds in issue in the earlier cases, nor was Gelpke a party or privy to the earlier cases. What the Gelpke case therefore affirms is not the standing of the Gelpke bonds, but that Gelpke has the protection for his bonds of a law rule made in earlier decisions to which he was not a party and in which other than his bonds were considered, and upon this, that the Supreme Court of the United States would not permit the Gelpke bonds to be invalidated by an abandonment of a law rule made for the benefit of all, though made before Gelpke bought any bonds.

PART 2-N.

In the Gelpcke case, 68 U. S. at 205 the conclusion as to what is settled by the earlier decisions is not reached because of something that is declared in any one or more of the earlier decisions but by a piecing together of what all of them when taken together can be in reason deduced to hold—in other words, if an examination of all the case law at the time the contract was made, reasonably construed, declares such a contract to be valid, a subsequent holding that it is invalid creates a federal question just as much as if the latter decision was in flat conflict with an earlier decision holding in terms that such contracts are valid.

Each of the eight cases considered in the Gelpcke case has similarity and dissimilarity. They are alike only in the fact that Gelpcke was not a party to them and that his bonds were not involved in them. They are respectively *Dubuque County v. R. R.*, 4 Greene, 2, wherein it is held:

The constitution does not deny power to vote a tax in aid of railroads on the ground that a statute giving that power delegates the power to legislate; the case declares that such vote involves no act that has the slightest approximation towards such legislation; that it neither creates nor repeals any law; that voting such aid is not affected by the limitation upon state indebtedness and that it might with equal propriety be said that the citizens of the state could not in the aggregate go in debt beyond \$100,000.

State v. Bissel, 4 Greene, at 332, is merely an affirmation of the case just commented upon.

Platt v. County, 5 Iowa, 151, is in effect, another affirmation of that case. It holds it has heretofore been determined in Iowa and is therefore not now an open question that the legislature has given counties authority to subscribe in aid of a railway company.

Ring v. County, 6 Iowa, 265, did not have the power to issue bonds for its main question. That main question was whether the bonds in controversy had been duly and formally executed as required by law. But in the course of decision it was found necessary to say:

"As the power of a county to issue bonds in the payment of subscription to the capital stock of a railway exists by virtue of the general law of the land, such power need not be set forth in the declaration in an action upon the bonds."

Speaking of the *Platt* case, *supra*, the *Ring* case says that counsel do not appear to look for a re-examination of that case and, "since the decision of the former cause the court has seen no occasion for a change in its views and the subject will not be again discussed in the present case."

In *McMillen v. Boyles*, 6 Iowa, 304, the holding is that because of the decision of two other cases cited, and because of many decisions concurred in by all the judges that have occupied the bench, there has been definitely and fully settled (not the rights of given parties or the dealing with certain contracts or certain rights) but a proposition that the constitution authorized the county to subscribe to stock in railroads and issue their bonds in payment therefor.

In *McMillen v. County Judge*, 6 Iowa, 390, there is the same situation, and reference to still other cases. What is ruled is again not a concrete adjudication but the abstract proposition that having been recognized at different times by a majority of the court, it may be regarded as settled that counties may make such stock subscriptions.

In *Games v. Robb*, 8 Iowa, at 199, the "first" question was said to be whether a county judge had power to issue bonds and subscribe for railroad stock and it is said:

"The first question we understand to be settled in favor of the power, by the cases of Clapp, Ring, McMillen and the cases there referred to."

These made the settled law on which the Gelpke case acted a set of pieces.

In the Douglass case, 101 U. S. at 685, it is said that after the decision of *Bassett v. Mayor* and *State v. Binder*, and considering the circumstances that attended these decisions and with the mind of the court having been directed by counsel in argument to the registration laws, the legislature might fairly assume it to have been judicially determined that assent of two-thirds of the qualified voters voting was the legal equivalent of the assent of two-thirds of all the qualified voters residing in an election precinct.

All of which fairly sums to the proposition that it is not essential that any one earlier case affirm the validity of the contract or the right to enforce contractual relations—that it suffices that a rule has been made, and the holding is that such rule can not be reversed by subsequent decisions, so far as dealing with the past is concerned, that it suffices if a principle sought to be violated in the later case can be deduced from ten earlier cases, each contributing a part, element by element, for the ultimate conclusion that the contract was valid when made.

A declaration that there was a conflict with earlier decisions has been based on finding that the earlier ones were one link in a chain; that they settled some one rule or principle which if followed to its logical end, made it improper to defeat the litigant in the later case, when he would not have been defeated had the earlier rule been followed to such end—*Olcott's case*, 83 U. S. at 693.

In *German Bank v. County*, 128 U. S. 526, 9 Sup. Ct. Rep. 164, such a conclusion is reached by ruling against

a contention made in the later case that the report of the earlier fails to show that certain questions in issue in the later case had been presented in the earlier one.

PART 2-O.

A recession may be worked out by indulging in inferential analysis including analysis of the arguments—by finding it to be *Stare Decisis* what the earlier law or decision was in effect and substance, and what the changing decision is in these regards.

The Muhlker case, 197 U. S. 544, 25 Sup. Ct. Rep. 525, declares that it itself rests upon the case of *Story v. Elevated Railway*, (N. Y.) 43 Am. Reps., 146, and upon *Lahr v. Elevated Railway Co.*, (N. Y.) 10 N. E., 528, which cases are known as the elevated railroad cases decided in 1882. It declares as to the Lahr case that in it the doctrine of the Story case was declared to be *Stare Decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. (Enumerating them).

The Muhlker case reaches its conclusion by noting from cases in New Jersey and elsewhere, affirming that those cases clearly express the right of abutting owners to light and air.

In a word, it is an assertion of *stare decisis*, pure and simple. It is not pretended that the other cases adjudicated the suit the Supreme Court is deciding, nor that exactly the same rights are involved, nor that the parties were the same. It is simply a declaration that when on analysis of decisions it is found to be a rule of law that one may not be unduly interfered with in the easement of light and air, and the highest court of a state has once so said, it cannot negative that result in the case of other

parties who have suffered an impairment in such easement after the first decision affirming the right was made.

A recession has been found by indulging in inferential analysis—say by holding that what is fairly to be implied is as much a part of the contract as that which the words expressed. (Citing Gelpcke's case and *City v. U. S.*, 103 Fed. 420).

Breyman v. Railway, 85 Fed., 583.

In the Gelpcke case it is said:

"The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them unless there be something which takes the case out of the established rule of this court upon that subject."

The Supreme Court does not proceed to settle a concrete controversy, but to evolve a doctrine or rule of law from the fact that in the earlier decisions certain objections were made urging that the constitution of the state did not permit a statute authorizing the issuance of bonds in aid of a railroad.

The court reached the decision that the Gelpcke bonds were valid, not because their validity had been affirmed in earlier decisions but because three enumerated objections were made and overruled, which objections asserted that the issuance of bonds of the Gelpcke kind was not authorized by the state constitution. It is not claimed by the Supreme Court that the overruling of these objections in a case to which Gelpcke was not a party nor his bonds involved, compelled the upholding of the Gelpcke bonds. What it does do is to declare that since these objections had been repeatedly overruled by the Supreme Court of Iowa,

therefore the validity of the authorizing statute had been settled and that, for that reason, Gelpcke could not be affected by any reversal of the earlier ruling which held said objections on the score of constitutionality to be untenable.

In the Douglas case, 101 U. S. 684, 685, the like reasoning is indulged in and the same result effected, and this, though—that while,

“It is true the bonds voted at this election were not to be used in payment of subscriptions to the stock of the railroad companies, the rule construed was the one in which provision was made for such subscriptions.”

Further—the Douglas case bases itself in part by following *State v. Binder*, 58 Mo., 450, of which it says that “similar language in another statute was construed.” It bases itself in part on *Basset v. Mayor*, because that case establishes the doctrine that an election of a certain kind has been by the sum of the decisions held to be “the mode contemplated by the legislature as well as by the law for ascertaining the sense of the legal voters upon the questions submitted, and that there could not well be any other practicable way in which such a matter could be determined.”

The Lewis case (N. Y.) 56 N. E. 548, declares that in reaching its conclusion as to the existence of said easements, it has been materially aided by certain other decisions.

In the Muhlker case, the declaration that certain things were settled by earlier cases is supported by the statement that, “The true relation and subordination of these rights, public and private, is expressed not only by the Elevated Railway cases, but by other cases collected in Vol. 1, Lewis’ Eminent Domain, wherein it is said, that “the existence of these rights or easements of light, air and access as appurtenant to abutting lots are as much property as the lots themselves, is established beyond question.”

In the Lewis case, 56 N. E. 548, it is declared the court has been materially aided in reaching its conclusion that an easement existed as to light, air and access, by opinions delivered in certain other cases, although it did not adopt all of the grounds upon which these other decisions proceeded to judgment.

In the Olcott case, 83 U. S. pp. 689, 690, 695, 696, 697, 698, it is ruled that a railroad is such public use as that it may be aided by taxation. With this as a premise, the next step was the declaring that there had been a recession from earlier cases because the case at bar held this class of bonds in aid of a railroad to be invalid, though the earlier cases had sustained bonds of that class, pp. 691, 692, 693.

PART 2-P.

As construction of the statute by the highest court becomes part of the statute law a change in such construction which operates retroactively on contract rights is as vicious as legislation that so acts.

The construction of a statute by the highest court of a state becomes a part of the statute and therefore a change in the construction of it by means of a judicial decision of such nature as to impair the obligation of a contract would violate a familiar provision of the Federal Constitution.

Braun's case, 66 Fed. at 479, 480.

This pronouncement is approved in Anderson's case, 116 U. S. 356, 6 Sup. Ct. Rep. 416 (which cites among others *City v. Lamson*, 9 Wall. at 485; Taylor's case, 105 U. S. 71; Thompson, 3 Wall. 330; Brown's case, 63 N. Y. 244; Colley Constitutional Limitations, 4th Ed., 474, 477; Dillon Municipal corp., Sec. 46.)

Such construction is regarded as a part of the statute and is as binding upon the courts of the United States as the text. *Morley's case*, 146 U. S. 162, 13 Sup. Ct. Rep. at 56 (citing *Leffingwell's case*, 2 Black at 603)—*State v. Ry.*, 3 Fed. at 888.

The construction put upon a state statute by the highest court of a state becomes a part of the statute and can no more be disregarded by the courts of the United States than it could be if it had been originally incorporated into the text of the statute.

Braun's case, 66 Federal at 479, 480.

After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purpose the same in its effect on contracts as is an amendment of law by means of legislative enactment. *Gelpke's case*, 1 Wall. 175; *Havemeyer's case*, 3 Wall. 294; *Thompson's case*, 3 Wall. 327; *Lee's case*, 7 Wall. 181; *Chicago v. Sheldon*, 9 Wall. 50; *Olcott's case*, 16 Wall. 678 (main case); *Fairfield's case*, 100 U. S. 47; *Louisiana v. Pilsbury*, 105 U. S. 278; *Douglas v. Pike*, 110 U. S. at 687; *Bank case*, 128 U. S. 526, 9 Sup. Ct. Rep. 163, 164.

The rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights than would be given to legislative amendment; that is to say, the change can be prospective but not retroactive.

Douglas case, 101 U. S. 687.

The validity and obligation of a contract can not be impaired by any subsequent act of legislation or decision of its courts.

Ohio Co. v. DeBolt, 57 U. S. at 432.

In *Township v. Talcott*, it is said:

"In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation."

In *Loeb's case*, 179 U. S. 472, 21 Sup. Ct. Rep. at 182, that the rights and obligations of parties accruing under settled decisions of courts of the state would not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation.

In *Havemeyer's case*, 70 U. S. at 303, that no subsequent action by the legislature or judiciary can impair the obligation.

PART 2-Q.

While a change in legislation tending to impair contract rights, of course, raises a federal question, one may be raised as well by a change in the construction of statutes if such change in such construction tends to impair contract rights.

This position is sustained by the overwhelming weight of authority.

The *Aetna Life Co. case*, 138 U. S. 67, 11 Sup. Ct. Rep. 215, speaks of what is not followed as being "the unsettled character of the decisions" in the highest court of the state.

In *Myrick v. Heard*, 31 Fed. 243, it is said:

That while the Federal Courts will follow the latest settled adjudications they can not as is said in the *Gelpke case* and in *Greene's case*, U. S. 3 Sup. Ct. Rep. 69, "follow oscillations in the process of settlement," and in *Opeika v. City*, 280 Fed 161, the *Gelpke case* is cited with approval for the proposition that "it cannot be expected that this court will follow every such oscillation from whatever cause arising that may possibly occur."

In *Douglas v. City*, 101 U. S. 686, 687, there is an approval of *Rowan's case*, 5 How., 134, and the following statement:

"But where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions if there be contract rights which have accrued under earlier rulings will be injuriously affected."

So far as this case is concerned we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.

In *Olcott's case*, 83 U. S. at 690, it is said:

"This court has always ruled that if a contract when made was valid under the Constitution and laws of a state, as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. (Citing among others the *Gelpke case*.) Such a rule is based upon the highest principles of justice. Parties have a right to contract and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule."

It is said in *Braun's case*, 66 Fed. at 479, 480:

"Where a state statute has been construed by the courts of the state and parties have acted upon that construction, and have entered into contracts upon the faith of it, the courts of the United States will refuse to follow later adjudications which change the former construction, whenever the rights of either of the contracting parties would be injuriously affected by so doing."

In the *Wade case*, 174 U. S. 499, 19 Sup. Ct. Rep. at 718, it is said:

"An exception has been admitted to this rule where upon the faith of the state decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled."

PART 2-R.

Express congressional legislation has made a federal question where the state court has made a change "in the rule of law or construction of a statute."

The Act amending Sec. 237, Jud. Code, approved Feb. 17, 1922, provides:

"In any . . . involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the constitution of the United States, the Supreme Court shall, upon writ of error" re-examine, etc. * * * If said claim is made in the highest state court by a stated time.

This is a new rule of Federal review. It is one that Congress has power to make. If the Federal Courts can make a rule that they will entertain jurisdiction where the State Court has changed from earlier decisions, Congress can make a rule that the Federal Court shall take cognizance when the State Court has given a new interpretation to an old statute. It is competent for it to say there shall be review by writ of error in cases that do not present a naked change of decision, and that there shall be such review if there has been a change in the construction of a statute, or a rule of law (whether that rule of law is a statute or something other than a statute.)

Surely, there has been a change in the construction of the joint tenancy statute.

Wood v. Logue, 167 Iowa, at 440, declares what the meaning of a certain statute is, and what the attitude of the state and its courts toward that statute. The decision was made after the Fleming contracts were. But the statute dealt with was enacted many years before those contracts were entered into. And the decision, no matter when made, is a binding declaration that the statute

always meant what the Logue case says it does. That is to say, the law assumes that the Flemings read the statute as the Logue case interprets it. The declaration is:

"That an estate of joint tenancy may exist in this jurisdiction does not appear to be denied by counsel, and, indeed could not well be. Estates of joint tenancy were well known at common law, and, though they have fallen into quite general disuse, are not entirely obsolete. Our Code, Section 2923, which provides that conveyance to two or more persons in their own right creates a tenancy in common, unless a contrary intent is expressed, is a reversal of the effect of such conveyance at common law; the rule there being that under a deed to two or more, no other intent being indicated, the grantees take as joint tenants, and not as tenants in common. The qualifying words in the statute cited, 'unless a contrary intent is expressed,' would seem, therefore, to leave place in the law of the state for a joint tenancy, with its characteristic incident of survivorship, if the intent of the parties to the instrument to create it is clearly indicated by the language employed."

Surely, the decision at bar changes the foregoing construction of said statute.

2-R-A.

Whether there has been a change in "a rule of law" depends on the definition of that term. My position is that while every law rule is not a statute, every statute is a rule of law—and that the term includes both written and unwritten law.

To have the force of "law," a rule must possess the quality of uniformity and universality and must operate upon all inhabitants of the entire political community affected by it, alike.

Words and Phrases, Vol. 3, page 34.

Law is the general body of rules addressed by the governing power to and obeyed by the members of the society. Bouvier, Vol. 2, 144; Austin Jr. (Campbell's Ed. 86)—

The aggregate of those rules and principles of conduct promulgated by legislative authority or established by local custom. *State v. Lumber Co.* (S. C.) 123 S. E. 504, 508,

Law is a rule of civil conduct prescribed by the supreme power in a state.

1 Steph. Com. 25—Encyc. Brit.

1 Bla. Com. 44.

Leavenworth County Com'rs v. Miller, 7 Kan., 479, 501.

1 Kent Comm. 447.

State v. Fry, 4 Mo., 120, 189.

Baldwin v. City, 99 Penn., 164, 170.

State v. Denny (Ind.) 21 N. E. 252, 254.

Cooley Cons. Limitations 90.

Davis v. Ballard (Ky.) (1 J. J. Marsh 563, 576.)

Ingersoll's case (Tenn.) 119 Am. St. Rep. 1003.

Henry's case, (R. I.) 73 Atl. 97.

Merchants Exch. v. Knott, (Mo.) 111 S. W., 565, 571.

O'Donoghue, 63 Ky. 478, 480.

It includes rules of civil conduct prescribed by the law-making power commanding what is right or prohibiting what is wrong.

Rudd's case (Tenn.) 39 Am. Dec. 189.

Appeal of Locke (Penn.) 13 Am. Rep. 716.

In *Duncan v. Magette*, 25 Tex., 245 253, it is said that law is a mass of principles classified, reduced to order and put in the shape of rules agreed on by ascertaining the common consent of mankind.

In Vol. 2, Bouvier's Law. Dict. p. 938, the author says on citation of Blackstone and English cases and text books, that a general principle of law is one recog-

nized by authority and it is called a rule because in new cases it is a rule for decision. On page 145 he adds that in a stricter sense, but still in the abstract, law denotes the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction and according to which it will regulate, limit or protect the conduct of the members of the community.

Many statutes are classed under one of the divisions above mentioned, because they have merely modified or extended portions of it, while others have created altogether new rules.

Rapalje's and Lawrence's Law Dict., Vol. 2, 731.

"The laws of a state," observes Mr. Justice Story, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." 16 Pet. 18. Hence, he argues, "in the ordinary use of language it will hardly be contended that the decisions of courts constitute laws." In the Civil Code of Louisiana they are defined to be "the solemn expression of the legislative will." See 145 U. S. 454.

In an article by Sir Frederick Pollock in 8th Harvard Law Review, 188, he contends that "it is not possible to make any clear-cut division of the subject matter of legal rules." 2 Bouvier's Law Dict., 146, says that "law may be taken for every purpose save that of strictly philosophical inquiry, to be the sum of rules administered by courts of justice." The author adds, there are principles of law which rest in custom and the adjudications of courts. (Vol. 2, p. 145.)

A statute is a declaration of the legislature that a given pronouncement is the law. Lane's case (Mont.) 13 Pac. 136, 139.

A statute, says Bishop, in Sec. 291 of Criminal Law, "is simply a fresh particle of legal matter dropped into the previously existing ocean of law." See *State v. Rechnitz*, (Mont.) 52 Pac. 264.

Many statutes have no form of a command or prohibition. 2 Bouvier's Law Dict., 145, 146.

2 Bouvier's Law Dictionary, 1032, says that a declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been—and that such a statute does not necessarily take away the common law.

Their sources, in the sense of the causes to which they owe their existence as rules, are thus classified: (1) usage which becomes law at the moment at which it receives the imprimatur of the state; (2) religion, the influence of which cannot be left out of account in studying the development of any secular system of law; (3) adjudication, whatever theory be accepted as to its nature as a source of law; (4) scientific discussion; (5) equity, as particularly exemplified in the administration of law by the Roman praetor and the English chancellor; (6) legislation, whether by the supreme power of the state or by subordinate authorities exercising a delegated function. Holland, Jr., Ch. 5.

But, as has already been said, "law" in the abstract involves much more. Thus, a reference in a statute to "the cases provided by law," includes not only those cases provided by former statutes, but also those contemplated by the common or unwritten law. 18 N. Y. 115.

While the word law is not always used as synonymous with statute, in the broader sense law includes both statutory and common law. *Fitzpatrick's case*, (Minn.) 90 N. W. 358.

In the common use of those for whom those laws are made, law includes the whole body or system of conduct including the decisions of courts as well as legislative acts. *Miller v. Dunn* (Cal.) 14 Pac. 27, 29.

The term includes not only written expressions of governing will, but also other rules of property and conduct in which the supreme power exhibits and according to which it exerts its governmental force. *Phelps case*, 1 Wash. Ter., 518, 523.

The written law is the statute law. The unwritten law is the common law. 1 Steph. Com., 40, following Blackstone.

That part of the law derived from legislation is called statute law. *Rapalje's Law Dict.*, 731—is the written will of the legislature and such law is used to designate the written law in contradistinction to the unwritten law. 2, *Bouvier's Law Dict.*, 1031.

The state has in general two, and only two, articulate organs for law-making purposes; the legislature and the tribunals. The first makes new law; the second attests and confirms old law, though under cover of doing so it introduces many new principles. *Holland, Jur.* 65; 2 *Bouvier's Law Dict.*, p. 145.

2, *Rapalje's Law Dict.*, 731, states that in a narrower sense law signifies a rule of law especially one of statutory origin and hence in its narrowest sense law is equivalent to statute. The author continues that with reference to its origin law is derived either from judicial precedents, from legislation, or from custom.

The term, law, includes decisions of courts as well as legislative acts. *Miller v. Dunn*, 14 Pac., 27.

2, Bouvier's Law Dict., page 145, says that statute law is a fruit of the conscious power of society, but the unwritten and customary law is the product of its unconscious effort—and that statute law should limit itself to aiding and supplementing the unconscious development of unwritten law.

The law of the land, an expression used in Magna Charta, and as adopted in most of the earlier constitutions, means, however, something more than the legislative will; it requires the due and orderly proceeding of justice according to the established methods. See 8 Gray, 329.

2, Bouvier's Law Dict, 145, says that no one statute nor all statutes constitute the law of the state; the principles laid down by the courts and the regulations of municipal bodies as well as to some extent the universal principle of ethics, go to make up the body of the law—and (146), to make the definition more narrow would exclude a large body of what is unquestionably law.

The term "law" as used in the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, embraces all legal and equitable rules defining human rights and duties and providing for their enforcement, not only as between man and man, but also between the state and its citizens. *Jenkins v. Ballantyre*, 30 Pac., 760, 8 Utah, 245.

Regulations prescribed by the Secretary of Agriculture for the inspection, disposition, etc., of cattle, sheep, etc., and the carcasses of meat food products of cattle, sheep, etc., not inconsistent with Act. Cong. June 30, 1906, c. 3913, 34 Stat. 674, authorizing such regulations, have the force of "law," *State v. Peet*, 68 Atl., 661, 663, (R. I.).

Law is a rule, not a transient sudden order from a superior, but something permanent, uniform and universal. In re Opinion, (N. H.) 33 Atl. 1076, 1078.

There is a distinction, says Blackstone, between a contract and a law and a law is called a rule to distinguish it from a contract or agreement. Landon, 11 Con. 251, 266. it is conceded judicial decisions are but real evidence of what the law is. Therefore, decisions are not the law in the sense that statutes are. Nor do they make unalterable law. *Paul v. Davis*, 100 Ind., 422.

2 Bouvier at 147, says that much of obscurity involving the origin of law and the mutual relations of customs and of statute law is caused by ambiguous uses of the term "source of law," employed to indicate among other things the mode by which authorities have formulated rules which have acquired the force of law.

Law is a rule of action. Blackstone. It is a general rule of action prescribed by the supreme power in the state. Pope's case, 50 Tenn., 682, 701; *People v. Quant.* (N. Y.) 12 How. Prac. 83, 84. It imports a rule of action. Baldwin's case, 99 Penn. 164, 170.

PART 2-S.

In this case plaintiffs in error are not confronted with what is in strictness a construction of the state statutes but rather by an interpretation of the general law.

In Olcott's case, 83, U. S. at 690, it is said:

It is not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to

the State of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which like questions of commercial law no state court can conclusively determine for us. This consideration alone satisfies our minds that while *Whiting v. Fon due Lac County*, undoubtedly is entitled to great respect, this consideration alone satisfies us that the Wisconsin case in consideration furnishes no rule which should control us.

Determining what are the uses for which general taxation is permitted, and particularly whether the construction and maintenance of a railroad owned by a corporation is a matter of public concern is not one of interpretation or construction of local statutes or constitutions. *Olcott's case* 83 U. S., at 689, 690.

In *Hartford Co. v. Ry.*, 70 Fed., 201, it is held that whether or not a lease by a railroad company of a part of its right of way, with a provision exempting it from liability from any damage to buildings or personal property situated thereon, resulting from the negligence of its officers or agents, or from fire communicated from its locomotive is against public policy, is a question of general law in regard to which the Federal Court while regarding the state decisions as persuasive authority must in the end exercise independent judgment.

Where a question involved in the construction of state statutes practically affects those remedies of creditors which are protected by the Constitution, this court will exercise its own judgment on the meaning of the statutes, irrespective of the decisions of the state courts, and if it deems these decisions wrong will not follow them, and this, whether the case come here from the Circuit Court in ordinary course or from the Supreme Court of the State under the 25th section of the Judiciary act. *Butz v. City of Muscatine*, 75 U. S., 575.

Whether the repeal of so much of a municipal ordinance granting trackage rights in a city street to a railway company as relates to double tracks was presumptively a reasonable exercise of the police power or a legislative impairment of the contract ordinance, is a question which the Federal Supreme Court, on writ of error to a state court, must decide for itself, independently of the decision of the state court. *Grand Trunk Western Railway Company v. City of South Bend, et al.*, 33 Supreme Court Reporter, 303.

Of course, it is settled that the Federal Courts will, as a rule, follow the Constructions of a State Statute given by the highest court of the state. But this rule is not followed in every case, as for example, it was not followed in *Gelpke v. City of Dubuque*, 1 Wall. 175.

Webb v. Southern Ry. Co., 235 Fed. at 590.

(And see *Haskell*, 289 Fed., 205-6; *Lane*, 151 Fed., 276; *Davis*, 104 S. W. 573; *Black*, Jud. Prec. 541.)

PART 2-T.

This case falls within the rule which will give these plaintiffs in error the right to independent review here where at the time the assailed contract was made there was no decision or statute invalidating such contract.

Even if there be no decision at the time of the action, it is the duty of the Supreme Court to determine upon its independent judgment what was the law of the state when the rights of the parties accrued. *Anderson's case* 116 U. S. 356, 6 Sup. Ct. Rep. 416, and see *Burgess' case*, 107 U. S. 33.

To like effect is *Jones v. Hotel Company*, 86 Fed., 373 (citing the *Burgess case*, 107 U. S. at 33). *Pleasant Twp. v. Co.*, 138 U. S. 67, 11 Sup. Ct. Rep., 215. *Louisville Co. v. City*, 76 Fed., 296 and 47 U. S., 36, 47.

At the time when these contracts were made the Gelpke case, decided in the Federal Supreme Court, was the law in Iowa with reference to contract impairment. It was the law in that jurisdiction, if for no other reason than that it was the reversal of a decision by the Supreme Court of Iowa, and therefore the final decision in the premises. It is true, of course, that the Gelpke case did not rule that a contract like the Fleming contract was valid. But at the time these contracts were made there was also in existence the decision in the Maybury case, 40 U. S. 20—and that case did hold that where there was a contract with any aspect of survivorship there never was a time when dower attached. We do not claim that the existence of these two decisions at the time the Fleming contract was made took away the power to make such a decision as we are now complaining of, and admit that if such a decision had been made by the Supreme Court of Iowa before the Fleming contracts were made, that decision, and not the said two Federal decisions, would govern. But what we do claim is that until such an Iowa decision came it was a case of no decision in Iowa, and that this contract having been made while there was no decision, it can not now be impaired by the decision at bar which, of course, was not entered until after the contracts had been made and had been acted upon for years.

PART 2-U.

The Federal question is adequately and properly raised.

Before this cause left the Supreme Court of Iowa finally these plaintiffs in error fully raised the Federal questions by presenting that the changes made by the court in the construction of statute and of decisions antedating

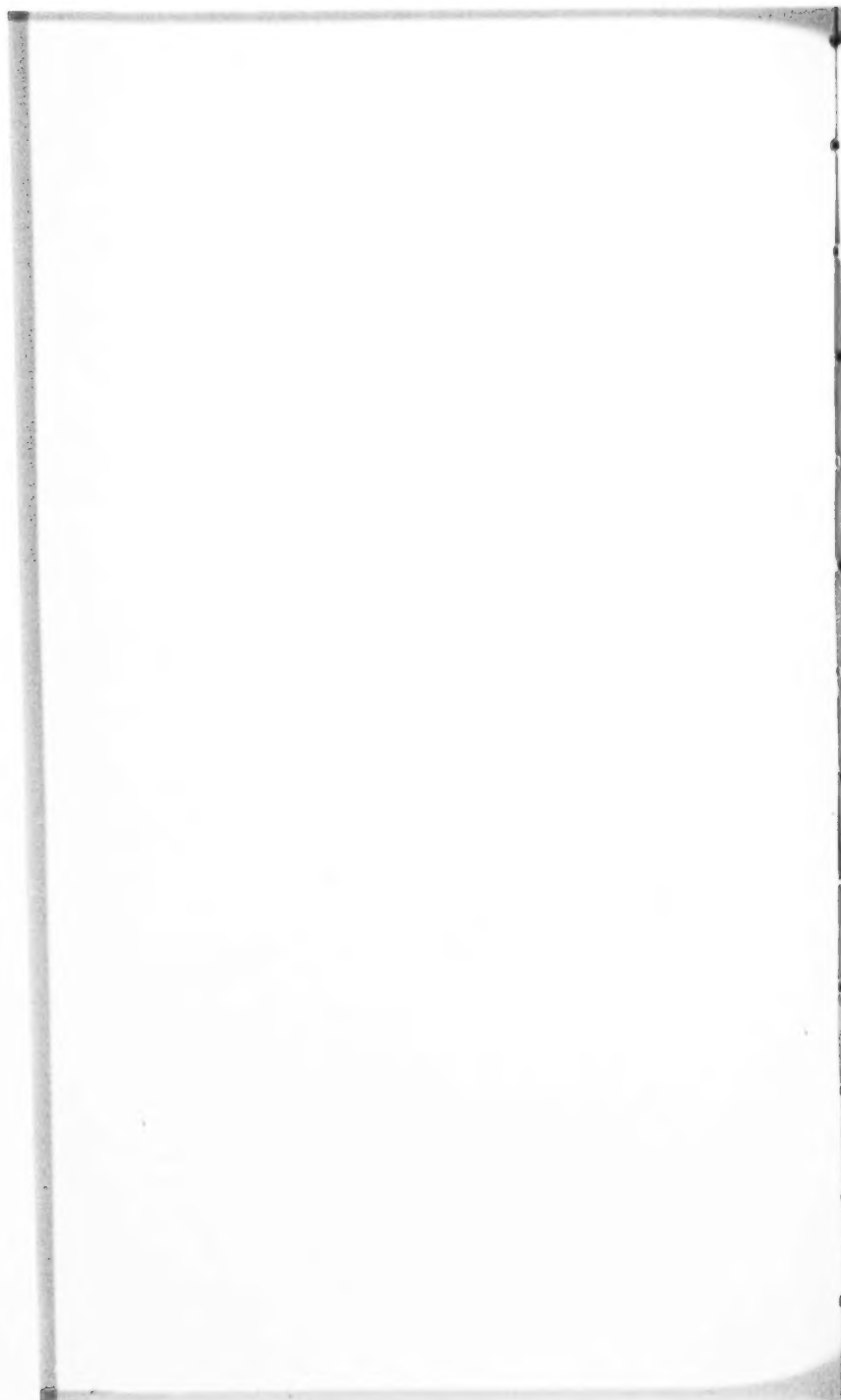
the contracts at bar, the court violated the rights defendants (now plaintiffs in error) had under Article One, Section Ten, of the Constitution of the United States, and were deprived of property without due process of law in violation of Section One of the Fourteenth Amendment. And the attention of the court was called to the case of *Muhlker*, 197 U. S., 544, (Tr. 78, 79, 80) (Second Petition for Rehearing, a to e, inclusive, Tr. 84, 85).

It is further submitted that the Federal questions raised had such consideration by the Supreme Court of Iowa as that it may now be entertained were there no other ground for entertaining it. See *Kentucky Union v. Kentucky*, 219 U. S., 140, *Illinois Central Railway v. Kentucky*, 218 U. S., 551; *Sullivan v. Texas*, 207 U. S., 416; *Grannis v. Ordean*, 234 U. S., 385. The place where this consideration was given is. (Tr. 130)

All of which is respectfully submitted.

B. I. SALINGER,
Attorney for Plaintiffs in Error.

Robert H. Cummings.
of counsel



Office Supreme Court, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

No. 175.

ROBERT J. FLEMING, JOHN A. FLEMING, STAN-
HOPE FLEMING, ET AL., ETC., PLAINTIFFS IN
ERROR,

vs.

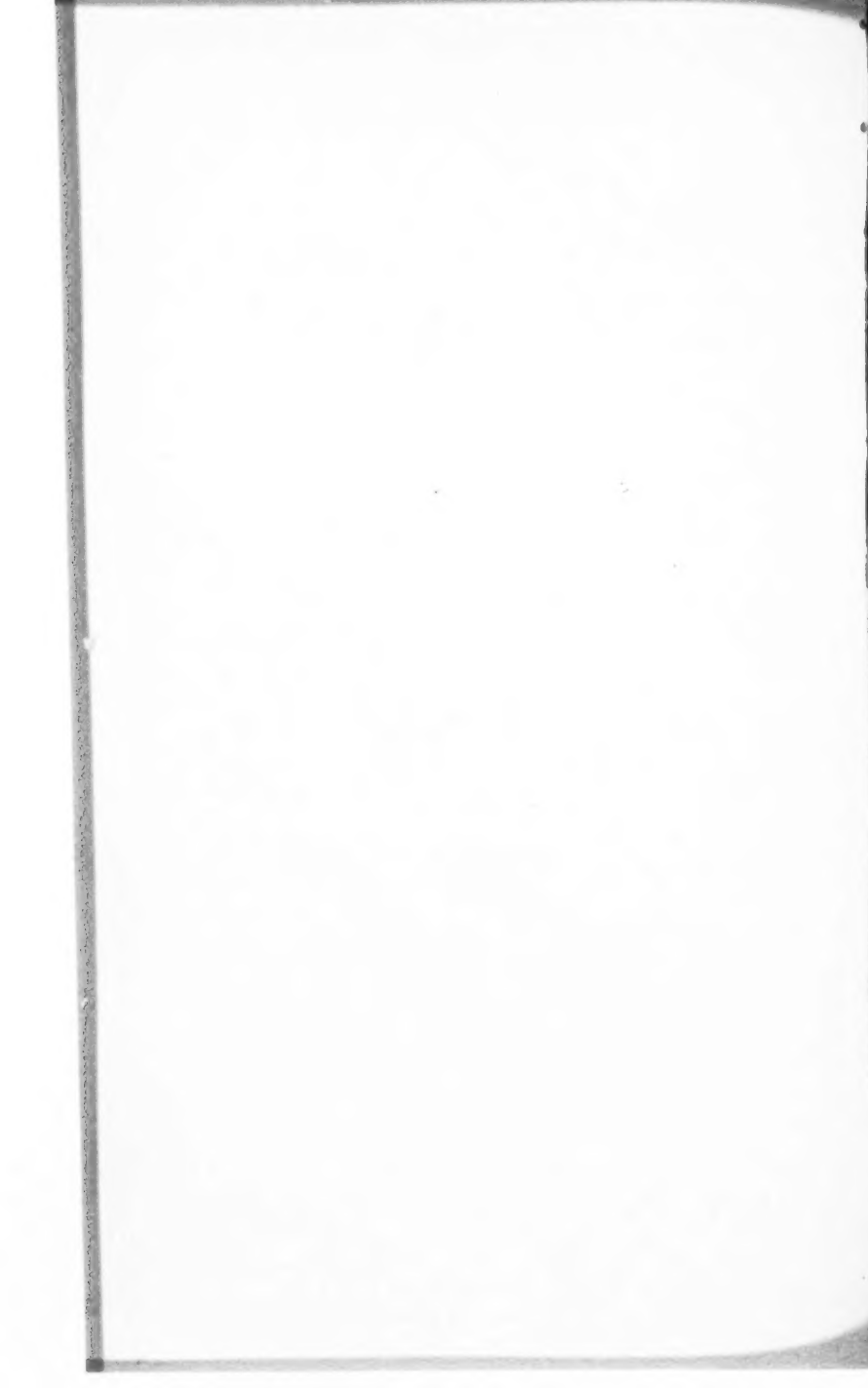
ANNA B. FLEMING, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

J. M. PARSONS,
Attorney for Defendant in Error.

EARL C. MILLS,
Of Counsel.



IN THE
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ERROR,

vs.

ANNA B. FLEMING, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

This cause was originally commenced in the District Court of Polk County, Iowa, in Equity, to determine the interest of Anna B. Fleming in the estate of her deceased husband and to have the Court declare that notwithstanding certain contracts, the deceased left an estate in the properties of Fleming Bros., composed of the plaintiffs in error and deceased. That

Court decided for the plaintiff herein, in 1917. An appeal was taken to the Supreme Court by the defendants therein, plaintiffs in error, and was affirmed December 16th, 1919. A petition for rehearing was filed February 5th, 1920, and overruled December 20th, 1920. A second petition for rehearing was filed February 17th, 1921, and overruled September 28th, 1921, and a third petition filed November 25th, 1921, and overruled April 23d, 1922.

A writ of error was taken to the Supreme Court of Iowa, on a petition filed December 16th, 1922.

Points and Authorities.

1. In the Brief and Argument of the counsel on appeal in the Supreme Court of Iowa, no alleged error or any point claiming any Federal question was presented in the statement of facts or in the brief and argument of appellants therein, and thereby any such question was waived.

Sub. Div. 5, Rule 53, Rules of Supreme Court of Iowa.

Lamkin v. Lamkin, 177 Iowa, 584-99.

Dodge v. Grain Shippers, 176 Iowa, 316.

2. Prior to the Rule of the Court, Subdivision 5, Rule 53, the law in Iowa was to the same effect.

Hintrager v. Hennessy, 46 Iowa, 600.

Tubessing v. Ottumwa, 68 Iowa, 691-4.

3. To the same effect is the rule generally.

Henderson v. Huey, 45 Ala., 275.

Grogan v. Ruckle, 1 Cal. 193.

U. P. Ry. Co. v. Colorado Postal Telegraph Co., 30 Col. 133.

Hine v. Clancy, 9 Ill. App. 190.

Mauer v. Board of Commissions, 36 N. E. 1101 Ind.

State v. Coulter, 40 Kans. 673—20 Pac. 525.

Succession of Broom, 14 La. Ann. 67.

Phipp v. Mo. Pac., 196 Mo. 321.

Powell v. Nev. C. & O. Ry., 28 Nev. 305.

McDonnell v. Carson, 95 N. C. 377.

4. A Federal question first set out in a petition for rehearing after the judgment of the trial court is affirmed will not support a writ of error by the Federal Supreme Court where the question was not passed on.

St. L. & S. F. Ry. Co. v. Shepherd, 240 U. S. 240.

Waters Pierce Oil Co. v. Texas, 212 U. S. 112.

Boone v. Scott, 233 U. S. 658.

5. The mere overruling of the petition for rehearing where the questions have been presented for the first time in the petition for rehearing does not give jurisdiction to the Federal Court.

Consolidated Turnpike Co. v. Norfolk & O. V. R. R. Co., 228 U. S. 326.

Forbes v. State Council, 216 U. S. 396.

6. The decisions of a State court on a question of fact is conclusive.

Spencer v. Merchant, 125 U. S. 345, 353.

Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114.

Egan v. Hart, 165 U. S. 188.

Western U. Teleg. Co. v. Call Pub. Co., 181 U. S. 92.

E. Bement & Sons v. National Harrow Co., 186 U. S. 83.

Baldwin v. Kansas, 129 U. S. 52.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226.
Thayer v. Spratt, 189 U. S. 346.
Avery v. Popper, 179 U. S. 305.
Lent v. Tillson, 140 U. S. 316.
Corry v. Campbell, 154 U. S. 629.
Kelly v. Pittsburgh, 104 U. S. 78.
Kennard v. Louisiana, 92 U. S. 480.
State R. Tax Cases, 92 U. S. 575.
Davidson v. New Orleans, 96 U. S. 97.
Kirtland v. Hotchkiss, 100 U. S. 491.
Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22.
German Nat. Bank v. Kimball, 103 U. S. 732.

7. The right of presentation of a Federal question having been waived before the Supreme Court of Iowa, and as to all such rights the time to take a writ of error having elapsed, and as to that the decree being final, the plaintiffs in error cannot now raise such questions.

8. The Federal questions raised in this cause are so obviously lacking in asserting any Federal right that the writ should be dismissed.

9. The only right the plaintiffs in error could possibly claim to raise a Federal question is under the Act of February 17th, 1922, amendatory to Section 237 of the Judicial Code, an act passed after all right to raise a Federal question had elapsed, and as to this case the said act is not effective for that purpose.

10. The decision by the Supreme Court of Iowa, was of such matters as that the Federal question did not arise.

11. The State Court held this, that the contracts in question were against public policy and were made for an im-

proper purpose, *i. e.*, to deprive the plaintiff in the suit of her rights as widow.

12. Such contracts as the contracts in question had never been held valid for the purpose claimed by defendant in error by the Supreme Court of Iowa.

13. The contracts in question were held by the Iowa Court to be testamentary in character and, hence not a bar to plaintiff's rights as widow.

14. The whole record of this case shows that the writ of error was taken for delay and hence the same should be dismissed or the decision of the Supreme Court of Iowa affirmed.

15. In construing a statute, it is always construed to be prospective and not retrospective, unless it is absolutely necessary to do so.

Lewis v. Southerland, Statutory Construction Volume 2, Sec. 642, Page 1157.

S. W. Coal Co. v. McBride, 185 U. S., 499.

16. Where exceptions have not been properly saved at the trial, an Act subsequently passed dispensing with the necessity of taking exceptions does not avail.

Liebold v. Kane, 85 Minn. 90.

17. The overruling of the second petition for rehearing, September 8, 1921, was a final judgment within the meaning of the Act of February 17, 1922, as to there being a Federal question in the case, and hence that Act, passed five months after the decision, would not control by its terms.

18. The same is true as to the overruling of the first petition for rehearing, December 20, 1920.

ARGUMENT.

This case was brought by Anna B. Fleming, the widow of Charles Fleming, in equity, in the District Court of Iowa in and for Polk County, on the 2nd day of March, 1918. She set up in her action the marriage with Charles Fleming, the fact that he left no last will and testament; that she was married on the 2nd day of January, 1881, and that she and the deceased lived together as husband and wife until his death on the 15th day of January, 1916. That John A. Fleming was appointed administrator of the estate when she learned for the first time that the Fleming Bros. claimed to own all of the property of the deceased except the exempt household goods of an estimated value of \$500.00. That certain real estate stood in the name of the deceased husband—the Fleming Building in the City of Des Moines and other real estate as a part of the assets of the Fleming Bros., Incorporated. That he owned 2,500 shares of stock therein at the time of his death. That John A. Fleming as administrator had filed a report as such setting forth that the deceased owned no property and claiming that it was all owned by the defendants, the plaintiffs in error here, by reason of certain contracts which are set out as copies to the petition in equity and set out herein in the printed record, pages 4 to 7. She set up that the contracts were null and void in so far as they affected her rights as the surviving widow of Chas. Fleming, deceased, for the reason that they were without consideration and contrary to public policy and because they operate as a fraud upon the plaintiff and her rights as the widow of deceased, and that her husband died seized of an undivided one-fourth interest in all of the property of the Fleming

Brothers, as a partnership, which partnership property includes all of the capital stock of the Fleming Brothers, Incorporated, and alleged that the contracts were testamentary in character and purported to do or accomplish in themselves what could not be accomplished even by will, under the statutes of the State of Iowa, and were of no binding force or effect upon the plaintiff, and were not made in good faith and were for the purpose of defeating her rights as widow. That they were concealed from her and were not made known to her until after the death of her husband, and asking for a decree construing the contracts to have no binding force or effect upon this plaintiff, and decreeing that Charles Fleming died intestate; and that the property held by the defendants be declared to be held in trust for her and that the amount of her interest as the surviving widow of Charles Fleming be fixed and determined, and that she be decreed a proper amount for her support during the year following the death of Charles Fleming, and for general relief.

A trial was had upon this petition and the answer and the evidence thereto and the trial judge filed a written opinion set out on pages 51 to 62 of the printed transcript. The Court in such opinion held that whatever was the intent and purpose of the first two agreements, the last agreement is determinative of the rights of the parties involved, as that was the agreement in force at the death of Charles Fleming. That in the absence of an agreement as to the interest of each brother, partner in the partnership, in the property of the partnership the law presumes it to be equal and upon that presumption, if not as the result of agreement.

He held further in said opinion, page 59 of the printed transcript, that whatever title and interest Charles Fleming

had in the property held and owned by the four brothers did not pass from him until death. As a means of divesting title the last agreement is not effectual until the death of Charles Fleming. Furthermore, the agreement by its terms did not operate as an agreement *in presenti* but as a conveyance only upon the death of one of the brothers. The instrument itself and the acts of the parties under the instrument do not reveal an intent to convey an estate or interest that should vest immediately, but on the contrary, one that should pass only upon death, and held further, on page 60 of the printed transcript:

“I conclude and hold that under the agreements, of which the last is the one under which the property is held that the decedent had an interest in the property of Fleming Bros. not disposed of prior to his decease, but disposed of at his death under the agreement, which disposition is testamentary in character but void for that purpose.”

He held further that the agreement was void as against public policy in so far as it affected the rights of the widow.

The decree of the Court was signed by Judge De Graff following the opinion of Judge Dudley, Judge Dudley being dead at the time the matter came on for final decree.

So that whatever question may have arisen in this litigation as to the interpretation of the contracts under which the plaintiffs in error claim and the interpretation of which is in question by the writ of error herein, arose upon the filing of the opinion and entry of the decree in the District Court of Iowa. In the appeal to the Supreme Court the appellant's brief and argument so far as the propositions and points are concerned is set out on pages 62 to 66 inclusive of the printed transcript. There are eleven propositions set out and in none

of these propositions is there any statement of any claimed Federal question whatever and hence no claimed Federal question could arise on the decision of the Supreme Court on the appeal so far as that opinion followed the decision of the Court below. The opinion of the Supreme Court was filed December 16th, 1919, and in that decision as one of the grounds thereof the opinion says:

"Under our law, the wife, the weaker vessel, the one who maintains the home and rears the children, is entitled to have provision made for her, if, peradventure, death robs her of the one legally and morally pledged to support and maintain her. She is entitled to share in such of his estate as by his efforts he accumulates and leaves at his death. The husband cannot take this from her by any testamentary disposition. He cannot contract with her for its release. In view of the legal status of the wife, in view of the relationship which she sustains to her husband, in view of those provisions of statute that protect and guard her interest during his life and after he is dead, it would seem to be against the policy of the law, expressed in the statutes, to permit men to legally get together and agree with each other that, upon their death, their wives and children shall receive no portion of the estate which they spent their lives in accumulating. It is a clear fraud on the marital rights of the wife. Many a wife has been a faithful helper in the building of great fortunes. Many a wife, by economy and self-denial, has been a strong factor in the building. Yet we are asked to say that this wife, who has done faithful service and practiced self-denial for 36 years that something might be left for declining years, must be left penniless. These are some of the features that bring this kind of tenancy into disfavor and show that it cannot be made to defeat a wife's claim under the statute

Again,

"The result is that the decedent left an estate; and the contract must be deemed to operate as a claim or incumbrance upon it either in part or in its entirety, in the same manner as a contract to make a will. Though, therefore, the contract be deemed enforceable as one to make a will, the question remains: Is it effective as against the widow of the decedent?"

"If in the absence of a contract the deceased partner had made a will disposing of his property to his brothers in the manner described by this contract, doubtless it would not be claimed that such will could be effective as against the widow.

"Code, §3376, provides:

"The survivor's share cannot be affected by any will of the spouse, unless consent thereto is given, etc."

"We have held that this section of the statute is applicable to personal property as well as to real estate.

Ward v. Wolf, 56 Iowa, 465, 9 N. W. 348;

Linton v. Crosby, 61 Iowa, 401, 16 N. W. 342;

May v. Jones, 87 Iowa, 188; 54 N. W. 231;

Code, §3362.

The statute therefore is an impediment to the operation of the husband's will upon his estate in such a way as to deprive the widow of her distributive share of either the personalty or the realty."

These opinions, both the original and supplemental opinion of the Supreme Court, as well as the opinion of Judge Dudley, all held the contracts void and inoperative as against the widow for the same reasons.

The opinion goes on and further holds that the arrangement between the brothers was that of a partnership, saying:

"We find, therefore, that a partnership existed between these parties. The provision, therefore, in the contract, that upon the death of any member his interest in the partnership property should pass to his brother partners is an attempt to make a testamentary disposition of the interest of each partner. A fair consideration of all these instruments shows that they were not understood as creating a joint tenancy. It fairly shows that all the brothers understood that they were associated together as partners, and that a partnership existed. An attempt to create survivorship among partners is an attempt to make a testamentary disposition of the dying partner's property or his interest in the partnership property, in favor of the surviving partners, to take effect after his death."

Following this opinion, on February 5th, 1920, the appellants filed a petition for rehearing, which petition for the first time undertook to set up the Federal question claimed here. The brief of the appellee, defendant in error herein, on this petition for rehearing and in resistance thereto, merely set out Sub-division 5 of Rule 53 of the Supreme Court of Iowa, which provides, that,—No alleged error, or point, not contained in the statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing. And the opinions of the Supreme Court of Iowa and Supreme Courts of other states holding that the rule meant what it said, also the opinions of the Supreme Court of the United States in the case of *St. L. & S. F. Ry. Co. vs. Shepherd*, 240 U. S. 240, and *Waters Pierce Oil Co. vs. Texas*, 212 U. S. 112.

This petition for rehearing was overruled December 20th, 1920, and in the opinion the court says:

"Personal property, it is true, would be subject to the good-faith indebtedness of the husband; but, as against the widow, it would not be subject to a mere scheme to absorb it. This does not imply that these brothers had a conscious purpose to wrong any surviving widow. Doubtless their only active purpose was to create the enterprise and to draw upon it for the care of all who were dependent upon them either severally or jointly. Though the contract imposed upon them no obligation in respect to any surviving widow, the surviving partners do recognize an obligation either moral or legal to care for the plaintiff as such surviving widow and they offer to provide her generous support. But the specific motive is not controlling. The right of a widow to her share of the estate, whether legal or equitable, owned by her husband at the time of his death, is impregnable; or it is not existent at all. This right does not arise out of any contract. Nor can she be required to accept generosity, however princely, in lieu of it."

And the opinion ends by saying:

"This opinion is supplemental to the original opinion and is not a substitute therefor. One reason therefor is the vigorous attack made upon the original opinion as being in conflict with *Stewart v. Todd*, 173 N. W. 619. The opinion in the latter case and the original opinion herein were both written by the late Justice Gaynor. No reference was made in the original opinion herein to the *Stewart* Case. An examination of that case will readily show how little occasion there was that such reference should be made. The contract in that case was one between husband and wife, and its enforcement was sought and obtained by the surviving husband as against the collateral heirs of his wife. The question whether a contract for his entire estate after death, between the deceased

spouse as grantor and a third party, is subject and inferior to the statutory right of the wife, or husband, was in no manner involved therein. Such is the controlling question in this case. We find no conflict in the two opinions."

A second petition for rehearing was filed on the 17th day of February, 1921, still urging the Federal questions and the same was overruled September 28th, 1921, in no way touching the Federal questions involved or claimed, but only modifying the decree as to some insurance that was involved in the matter, and in the 3d Sub-division of that opinion the Court says:

"The appellants urge upon us very earnestly that the effect of our holding here is to overrule prior decisions, and therefore to deprive appellants of their property without due process of law in alleged violation of the Constitution of the United States. The premise upon which such plea of unconstitutionality is based is negated by the opinion complained of. It does not purport to overrule prior decisions. Appellants' contention to such effect is argumentative only, and is not sustained by us. Moreover, if the premise were conceded, and if it were deemed correct to say that the overruling of a prior decision by an appellate court of a State is a violation of the Constitution of the United States, such point would have been just as available to the appellants in their original argument as in their petition for rehearing. No such point was therein made.

"We are asked to recognize the point now made as presenting a Federal question. If we could properly do so as a matter of sincere deference to the higher court or as a matter of courtesy to the distinguished counsel, we should not be reluctant to make such

declaration as would enable a review of our decision by the higher court. But judicial candor compels us to say that we see no Federal question involved. The decree below will be modified as above indicated and otherwise affirmed."

So far, there is no question but what the appellants in error had waived all right they had or ever had to raise a Federal question in this case. This right was waived when they filed their brief and argument and failed to mention the Federal question, and that right was never revived. Also, it seems to us that the right to raise this Federal question never existed and cannot be made to exist for the reason that the opinions of the Supreme Court of Iowa show on their face that they are based upon propositions which do not require the investigation of any Federal question and that they are based upon findings of fact made by the District Court and the Supreme Court and based upon the public policy of the State of Iowa and the laws of the State and that therefore no Federal question could arise.

Act February 17th, 1922.

The only possibility there is in this case, if there is a Federal question involved, of the plaintiffs in error raising that question, depends solely and entirely upon the Act amendatory to Section 237 of the Judicial Code. That statute is as follows:

"In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme

Court shall, upon writ of error, reexamine, reverse, or affirm the final judgment of the highest court of a State in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

This bill was not introduced until after the decision of the Supreme Court on the first petition for rehearing on December 20th, 1920. The Bill went through the regular courses in the Senate and finally passed the House and was approved February 17th, 1922, more than two years and four months after the original opinion had been filed in the Supreme Court of the State of Iowa, and more than three years and six months after the appellants, plaintiffs in error herein, had waived their right to raise any Federal question by filing a brief and argument making no reference thereto.

True, it may be urged that the amendment provides that where there is a suit involving the validity of a contract and it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall reexamine, etc. But where the lower court has decided the question squarely in this case and an appeal which in Iowa is *de novo* is taken to the Supreme Court of the State and under the rules of that court all questions not raised are waived, can they now, even with this statute in force raise that question? Are they not by their waiver estopped from raising that question?

The 17th point presents the proposition that the overruling of the second petition for rehearing more than five months before the passage of the Act of February 17, 1922,

renders that Act not applicable. At the time the ruling was made it was right, the question as pointed out had not been properly presented. True, another petition was filed and denied. So they could have kept filing and denying until now. Was not that a final judgment? If not, a judgment is never final as long as one keeps asserting he has the right to set it aside. In other words, must not the claim that a change of rule has been made, be presented properly to the Court? Must not some observance be had to the rules of the Court in which the litigation is pending? Is it sufficient to merely assert it without asserting it in a legal manner?

We contend that when the Court overruled the first petition, December 20, 1920, it was final as to that matter, *i. e.*, the condition of a Federal question. This took place two years and two months before the Act of February 17, 1922, was passed.

The judgment is none the less final, even though a petition to rehear be filed, or a motion to set aside be filed. They are analogous; they each merely suspend, perhaps, enforcement, some remedy or further Act under the judgment. An overruling of either a motion or a petition is, in effect, simply saying to the movant or petitioner, "The judgment entered is, and was at the time of entry, final."

In the dissenting opinion in this case to the first petition for rehearing, it is argued that the decision herein conflicts with *Stewart vs. Todd*, 173 N. W. 619. We think the concluding clause of the majority opinion referred to sufficiently explains *Stewart vs. Todd*. *Baker vs. Syfritt*, 147 Iowa, 49, is also referred to in the same connection. We see nothing in this case that is in any way analogous to *Baker vs. Syfritt*. In that case, it is true, the Court upheld the disposition of

personal property, but it was an honest disposition and not one made with the view of defeating the rights of the widow, and the actual passing of title came before death.

Wood vs. Logue, 167 Iowa, 436, is also cited in the dissenting opinion.

In the case of *Wood vs. Logue*, there was a demand actually made by the owner of the property, and in the conveyance certain conditions were attached, and certain rights required, and it was held that the property was, of course, subject to the provisions of the conveyance.

An examination of the opinions of the Supreme Court of Iowa, in the other cases cited from Iowa will show that the propositions involved herein in the construction of the contract, modified as it is by the right of the widow to her widow's share, have never before been passed upon by the Supreme Court of Iowa, and the decisions will be searched in vain to discover any fixed, definite, set rule in the State on the matter.

It is our contention that there is no Federal question involved here; that there has been no change in the rules as to the construction of contracts or statutes in the Supreme Court of Iowa. That clearly appears from the opinion of the Supreme Court itself and particularly from the opinion on the last petition for rehearing.

This record, then, presents to the Court this question: Where a party in the State Court has waived all his rights to question on Federal or Constitutional grounds, the decision in the lower courts in presenting, as the plaintiff in error did, their appeal to the Supreme Court of the State without raising any Federal or Constitutional question, can they afterward assert that right? Is it to be conceived that they can

thus play fast and loose with the State Courts, fail to obey the rules of that Court in presenting their questions, become barred as the law then exists, and by a subsequent Act of legislation have these rights revived?

A peculiar situation exists in this case. The case was decided December 16th, 1919. The first petition for rehearing was overruled December 20, 1920. The second petition for rehearing was filed February 17, 1921. On the 17th day of May, 1921, the Bill, Senate File 1831, was introduced into the Senate of the United States for the purpose of amending Section 237 of the Judicial Code as finally amended by the Act of February 17, 1922. This Bill was introduced by Senator Cummins, who appeared in this action for the defendants, and in the progress of the Bill through the House, Mr. Boies, of Iowa, had the Bill in charge, and the proceedings on the passage of this Bill are found in the Congressional Record, pages 1426 and 1427, January 16, 1922, and during these proceedings the following statement was made by Mr. Boies:

"Mr. Boies. Mr. Speaker, I can say to the gentleman that there is a case pending now in the State of Iowa of considerable importance that has brought to the attention of judges and lawyers the necessity for this amendment."

We place this in the record, as it shows a peculiar state of facts. We do not claim that it really makes any difference in the law as it exists and is, but we do think that it at least calls for a careful scrutiny of the record, and is perhaps an explanation of the repeated filing of petitions for rehearing after the right of appeal had been lost, and that right was

certainly lost, that the overruling at the second petition for rehearing, and it may be the reason why the third petition for rehearing was filed, with no excuse whatever for filing that petition, except that time might be had to procure the passage of the bill.

Rules of the Supreme Court of Iowa.

Rule 53, Subdivision 5, of the Supreme Court of Iowa, set out in the printed transcript of record herein on page 81, is as follows:

"The errors relied upon for a reversal. Following this the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. When text books are cited the number or date of the edition must be stated, with the number of the volume and the page or section. No alleged error, or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing."

Respectfully submitted,

J. M. PARSONS,
Attorney for Defendant in Error Herein.

EARL C. MILLS,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D., 1923.

No. 175.

ROBERT J. FLEMING, *et al*, *Plaintiffs in error*.

vs.

ANNA B. FLEMING, *Defendant in error*.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF IOWA.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

The decision of this court in the case of Tidal Oil Company vs. Flanagan (January 7, 1924), does much to clarify and narrow what is to be submitted to this court in this case. It disposes of the contention made for the defendant in error that there is no jurisdiction here because the Federal question now urged by the

plaintiffs in error was not presented to the Supreme Court of Iowa except in a petition for rehearing. It was, however, presented before final judgment was entered, because that was done on February 17, 1921. (84, 131). And the Flanagan case settles that the presentation was timely because of the provisions of the Act, (42 Stat. 336), approved February 17, 1922. That decision leaves undisturbed the many holdings in this court that the time allowed for perfecting writ of error does not begin to run while a petition for rehearing is pending nor before final judgment. We submit said act applies here. While we grant that statutes are presumed to speak prospectively that does not make said act inapplicable. As it does not except pending litigation, then since it became effective February 17, 1922, and this writ of error was not sued out until December of that year, it does operate prospectively. We think this would be so if the Act had not gone into effect until after this writ had been sued out—but that is moot.

It may well be said in passing that under familiar rules the late raising of the Federal question would not be in our way if said act had not been passed. That rule is that even if the point be first made in a petition for rehearing, that will suffice if the state court gives consideration to the point, other than merely overruling the petition for rehearing. (See Transcript 130).

II.

If the Flanagan decision deals rightly with the Act of February 17, 1922, it eliminates our argument made before the rendition of that decision, that a Federal question is raised by judicial impairment of our contract rights by means of decisions which differ from

those made before those contracts were entered into.

But as we read the Flanagan opinion, it does not depart from the rule that a Federal question is raised when by means of judicial interpretation of a statute, contracts that were valid under an earlier construction are made void by a differing construction, pronounced after the contracts were made.

It is said in the Flanagan decision :

“In each of them (Muhlker 197 U. S. 544 and Pillsbury 105 U. S. 278, 290) a statute had been passed subsequently to the contract involved and was held to impair it. In such a case this court accepts the meaning put upon the impairing statute by the state court as authoritative, but it is the statute as enforced by the state through its courts which impairs the contract, and not the judgment of the court.”

As we view it, this is but a reaffirmation. We think it was always the rule here that where a contract is entered into while a given interpretation of a statute stands, such interpretation is a part of the statute, and that a departure from that construction, made later, is the equivalent of a change in legislation.

We notice the Flanagan case finds some “unguarded language” in some of the earlier decisions including that of Gelpcke, 1st Wall 175, 206. But we fail to find that the criticism is addressed to the following pronouncement of the Gelpcke case :

“The same principle applies where there is a change of judicial decision as applies to the constitutional power of the legislature to enact the law. To this rule thus enlarged we adhere. It is the law of this court.”

Be that as it may, the criticism does not seem to be addressed to *Lamson* 9 Wall. at 485; *Taylor* 105 U. S. 71. Nor to *Cooley*, Const. Lim. (4th Ed.) 474; 477, nor to *Dillon*, *Municipal Corp.*, 46, nor to the case of *Morley*, 146 U. S. 162.

The authorities just referred to each and all hold that the construction of a statute by the highest court of a state becomes a part of the statute. That therefore a change in its construction by means of a judicial decision, of such nature as to impair the obligation of a contract, would violate a familiar provision of the Federal constitution. In the *Morley* case 146 U. S. 162, it is ruled that such construction is regarded as a part of the statute and is as binding upon the courts of the United States as the text.

In *Havemeyer's* case, 3rd Wall. 294; *Thompson* case, 3rd Wall 327; *Lee's* case, 7 Wall. 181; *Sheldon's* case, 9 Wall 50; *Olcott's* case, 16 Wall. 678 and still others, it is ruled that after a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as is an amendment of law by means of legislative enactment. In *Ohio vs. DeBolt* 57 U. S. at 432, it is said that the validity and obligation of the contract can be impaired by neither subsequent act of legislation or decision of courts.

In the case of *Township vs. Talcott*, 86 U. S. 678, it is held:

“In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation.

The Loeb case 179 U. S. 472 rules that the rights and obligations of parties accruing under settled decisions of courts of the state can no more be affected by a different course of judicial decision subsequently rendered than by subsequent legislation."

In the Havemeyer case 70 U. S. at 303 that no subsequent action by either legislature or judiciary can impair the obligation.

In the Olcott case 83 U. S. at 609 it is said:

"This court has always ruled that if a contract when made was valid under the constitution and laws of a state, as these had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be ruled by this court as establishing its invalidity * * Parties have a right to contract and they do contract in view of the law as declared to them when their engagements are made."

In the Wade case 174 U. S. 499 it is declared to be controlling that state decisions affirm the validity of contracts made under a certain statute, and that this protects other contracts made under the same statute before the prior construction of them was overruled.

Were it not for one statement presently to be noted, we would feel sure the Flannigan case does not intend to interfere with the rules laid down in the foregoing cases, that it remains the rule that whatever may be true of a naked conflict in decisions, a change in the interpretation of a statute is the same as a change in the statute, where contract rights were acquired under the first interpretation and are going to be lost if the later interpretation rules. If the interpretation is

part of the statute, it would sacrifice substance to technicality to hold that a change in interpretation is not a change in statute.

It is confessed that if a law were passed by using the ordinary methods of legislation and that law in terms sanctioned a survivorship agreement or a joint tenancy, if the same machinery later repealed this statute or declared that such contracts and such tenancy should not be deemed lawful there would be a Federal question.

As the statute first enacted has the judicial interpretation injected into its text, the passing (making) of the law is accomplished not alone by legislative action but by it and said interpretation. The law that is passed is the statute as interpreted by the court of last resort. Nothing can refine that fact away. It is a case of agency. There is nothing in the Constitution that prohibits a state from delegating a vital part of the passing of laws to its court of last resort. The rule that the interpretation is part of the text has been builded upon the fact that the legislative branch has accorded the judicial department the power to say what the statute is. The two departments pass the law. And what is said of the first statute of course is so as to a repealing or amending statute. It is unthinkable that relief against impairment depends on what court finds it, or that it is material that the wrong is done by two arms of the State Government, jointly, rather than by the legislative arm alone. On that theory what becomes of the rule that the construction is part of the text.

We have said that if it were not for one statement in the Flanagan decision, nothing in it creates any difficulty about finding a Federal question. The statement that creates the doubt is an attempted distinction be-

tween review of what is done in a lower Federal court and review on writ of error to the highest state court. The statement is:

“These cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to Federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decision of a Supreme Court of a state prior to their execution and had been denied by the same court after their issue or making. In such cases the Federal courts exercising jurisdiction between citizens of different states held themselves free to decide what the state law was and to enforce it as laid down by the state Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Art. 1 Section 10 of the Federal Constitution but on the state law as they determined it, which, in diversity citizenship cases under the 3rd Art. of the Federal Constitution, they were empowered to do.”

It may be said in passing that the Muhlker case (perhaps others) was a writ of error to the Court of Appeals of New York. Be that as it may, is the distinction tenable? While the Federal courts may protect against judicial constructions of statutes which work an impairment of contract because diversity of citizenship gives them power to determine, it cannot be the vital thing what court deals with the impairment or what provision of the Constitution authorizes them to act. The vital thing is that an *impairment by statute construction* does raise a Federal question. The Federal courts act on such impairment because diversity of citizenship exists; the highest court of a state may

find the like impairment between citizens of different states, if no removal has been sought, or in a case between citizens of the same state. The Federal courts may not pass on impairment unless there be diversity of citizenship. The state court may pass on it if there be diversity or if there be not. Take the cases of confiscatory public utility rates, and fixing such rates by contract. They are entertained here whether the case comes to a Federal or a State Supreme Court.

Could Congress not legislate against strikes. If yes, could it not effectively direct this court to review action had in some suit arising under such strike law.

The fact remains that when either class of court finds a change in statute interpretation which destroys contracts this raises a Federal question, whether it be one class of court or the other that finds such impairment to exist.

Later, we have to deal with whether the enumeration of the things to which the judicial power shall extend excludes what is not found in the enumeration. Writ of error to a state court is not listed. There is no constitutional provision that authorizes review on such writ. That fact was once the basis of a stout contention that while this court might review the action of the lower Federal tribunals it could not review the action of a state court of last resort. (See *Paddleford*, 14 Ga., 438; *Pierce*, 27 Ohio State 155; *Martin*, 1 Wheat. 304; *Hempstead*, 6 Conn. at 488.)

The controversy was finally brought to an end because when the mandate of this court was not obeyed by the state court upon claim that this court could not review the action of that court, by the issuance of alternative process here. The controversy developed the rule that every court in the land is in such sense an in-

ferior tribunal as that this court can (if Congress authorizes) review its action. (See *Skillern*, 6 Cranch. 268; *Stewart*, 3 How. 425; *Martin*, 1st Wheat. 304.)

There is on the statute books a provision under which though there be no diversity of citizenship a victim of mob violence may transfer his cause to the Federal courts. Of course this opens the door for such review as Federal court action may have. If Congress could validly enact such a statute (and its validity has never yet been challenged), why does it not have the power to provide that when a claim for such violence reached the highest court of a state its action might be reviewed here by writ of error to that court. Unless the Act of February 17th was intended to effect nothing, it, at least, does for causes like the one at bar what would be effected in the illustration of mob violence.

We submit this position is fortified by the following statement in *Flanagan* case:

“There is another class of cases relied on to maintain this writ of error. They are those in which this court has held that in determining whether a state law has impaired a contract, it must decide for itself whether the law as enforced by the state court impairs it. It often happens that a law of the state constitutes part of the contract and to make the constitutional inhibition effective this court must exercise an independent judgment in deciding as to the validity and constitution of the law and the existence and terms of the contract.

“The difference between this class of cases and the present one is that in the present one it is claimed that a state court judgment alone, and without any law, impairs the obligation of a contract.”

III.

When these contracts were made there was in force Section 2436 of the Code of Iowa. At that time that section had been construed time and again to mean that while the surviving spouse had a distributive share in the personal property of which the spouse died seized, that during life neither had any interest in the personal property of the other and the other might dispose of it at pleasure. (Original brief 46, 47).

The decision at bar nullifies that interpretation by holding that Charles Fleming could not in his life dispose of his personal property by contract in the nature of a survivorship agreement.

At the time these contracts were made Section 2923 of the Code of 1897 was in force. In the case of *Wood vs. Logue* 167 Ia. 441, and in other cases (Original brief 25) that statute was construed to permit arrangements in the nature of a joint tenancy with its incident of survivorship.

The decision at bar reverses these interpretations. The effect of the two departures from interpretation of statute works, for all practical purposes, that when the contracts were made the statute permitted their making, and that after they were made and the *status* could not be restored, the statute was changed so as to destroy those contracts.

IV.

We concede that if the case of *Flanagan* deals rightly with the Act of February 17, 1922, we have no rights except such as flow from impairment of contract rights by means of conflicting decisions. We respectfully urge that the court is in error as to what said act effects. Roughly speaking, it provides that where there is a suit involving the validity of a contract and it is

claimed therein that the highest court of a state has made a change in the rule of law or construction of statutes applicable to such contract which it is asserted is repugnant to the constitution of the United States, the Supreme Court shall upon writ of error re-examine, etc., provided that said claim is made by a stated time.

The Flanagan case says as to this:

“We cannot assume that Congress attempted to give to this court appellate jurisdiction beyond the judicial power accorded to the United States by the constitution. The mere reversal by a state court of its previous decision * * whatever its effect upon contracts, does not * * violate any clause of the Federal constitution. Plaintiffs’ claim, therefore, does not raise a substantial Federal question.”

We think this is a clear statement; first, that there is no substantial Federal question unless it raises a violation of some clause of the Federal constitution; second, that Congress has no power to direct what shall be reviewed in this court unless something has been done that constitutes such a violation.

We are unable to find any provision in the constitution which creates either of these limitations. We submit that no such limitation has ever before been asserted; that Congress has often directed review as to matters that are not violations of the constitution, and that the regulation has been obeyed without challenge. Probably that may be explained by the fact that Section 2 of Article 3 does not limit the matters to which the judicial power shall extend to cases arising under the constitution but extends that power as well to cases arising under the *laws* of the United States. The obvious result is that if Congress enacts any valid law the constitution provides that cases arising under that

law shall be reviewed here even though no violation of the constitution be involved.

Congress is given the power "to constitute tribunals inferior to the Supreme Court," Article 3, declares that the judicial power of the United States shall be vested not only in the Supreme Court but in such inferior courts as the Congress may from time to time ordain and establish. Clearly, this gives power to regulate appellate procedure in matters disposed of in these inferior courts and obviously permits such regulation although the cause in the inferior court does not involve a violation of the constitution. And the matter does not stop with appellate procedure as to those inferior tribunals. It will be conceded that in many cases a writ of error lies to the court of last resort of a state. This proves that power to regulate appellate procedure is not limited to reviewing the action of inferior Federal tribunals.

We repeat there is nothing in the constitution which stops Congress from commanding appellate review here, even though no violation of the constitution is asserted. To be sure, Section 2 of Article 3 enumerates certain things to which the judicial power shall extend. But it fails to enumerate many things to which that power has always been extended. Writ of error to a state court is not mentioned. In other words, the enumeration has never been treated as speaking in terms of exclusion. The enumeration does not include patent suits except it be for the clause extending the power to all cases arising under the laws of the United States. The fact then that taking property through impairing contract rights by means of judicial decisions is not found in the enumeration in Article 3, is no evidence that Congress might not enact a law prohibiting such impairment, and if it did this, it

would follow it could validly require this court to deal with such impairment.

True, the constitution has a specific command that legislation shall not work such an impairment. That means that Congress could not permit one. But does it also mean that because the constitution limits itself to impairment by legislation that Congress can not prohibit an impairment other than by legislation. At the least, Congress can make an expository law that taking by certain classes of judicial action shall be deemed a taking of property such as is prohibited by the 14th amendment.

We submit Congress has the power to protect against a seizure which though judicial in form, in fact constitutes a taking of property without due process of the law and to declare that judicial impairment violates the Fourteenth Amendment—has the power to regulate appellate procedure in matters that do not involve an infraction of the constitution.

V.

It is, of course, possible that though the attitude that has just been discussed is untenable, that still the ultimate conclusion reached in the Flanagan case is sound. The question still remains what the Act of February 17 *does* do. This has been perceived because the court said:

“The intention of Congress was not, we think, to add to the general appellate jurisdiction of this court, existing under prior legislation.”

This raises no question of the power of Congress but narrows the inquiry to what power Congress has attempted to exercise. We take it, there is a presump-

tion that no Congressional enactment is made idly and without purpose to accomplish anything substantial. The Act directs there shall be review by writ of error if the Federal questions dealt with by the Act are presented by a stated time. What is accomplished by regulating the time for raising a question if after it is raised it must be found there can be no appellate review because there is no Federal question. Why provide the time in which to raise that there has been a change in the rule of law or construction of statutes by the highest court of a state if it be utterly immaterial whether or not there has been such a change. It seems to us that the Act is at least legislative construction, that the change dealt with does raise a Federal question that should be reviewed by writ of error. Whatever doubt there is arises from the fact that the act specifies a change alleged to be repugnant to the constitution. We have already said all we can on that head. Our position as to it is that, at least, Congress has construed such a change to violate the 14th Amendment.

Respectfully submitted,

B. I. SALINGER and

A. B. CUMMINS,

Attorneys for Petitioners in Error.

3. A state statute in force when a contract was made cannot be made a subsequent statute within the meaning of Art. I, § 10, of the Constitution through new interpretation by the state courts. P. 31. Writ of error to review 194 Iowa, 71, dismissed.

ERROR to a judgment of the Supreme Court of Iowa, which affirmed a judgment for the plaintiff, in her suit to recover her statutory share, as widow, of property left by her deceased husband, and claimed by the defendants as his surviving partners.

Mr. B. I. Salinger, with whom *Mr. A. B. Cummins* was on the briefs, for plaintiffs in error.

Mr. J. M. Parsons, with whom *Mr. Earl C. Mills* was on the briefs, for defendant in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Iowa. The suit was begun in Polk County District Court by Anna B. Fleming, widow of Charles Fleming, against three brothers of her husband, one of whom had become his administrator, to secure her dower rights under the state statute in the share of her husband in the property of a partnership of the four brothers, in the business of soliciting and placing life insurance. The defendants' claim was that Charles lost all interest in the partnership upon his death, that by virtue of three contracts the property passed to the survivors, and the partnership of the three continued in possession and title free from any claim by heirs, next of kin, or the widow of Charles. The Supreme Court of Iowa held that these contracts constituted a contract by each partner to make a will to his survivors, were testamentary in character, and were avoided by § 3376 of the Code of Iowa, providing that as between husband and wife the survivor's share can not be affected by any will of the spouse without previous consent of the survivor.

It is assigned for error that in this ruling the Supreme Court of the State reversed its former rulings, under which such a contract of partnership had been held to be valid and not avoided by § 3376 or any other section of the Code; that on the faith of these rulings, the partnership contracts herein had been entered into, and that the new construction of the statute was an impairment of the contracts of partnership in violation of Article I, § 10, of the Federal Constitution. This objection was made in the Supreme Court of the State on the application for a second rehearing, and the court held in its opinion that the point was not well taken because no prior decisions had in fact been overruled. This is a sufficient consideration of the point by the State Supreme Court before its judgment, to justify an assignment of error raising the federal question, if in fact and in law it be one.

In *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, we had occasion to consider the same issue. After a somewhat full examination, we held that, by a score of decisions of this Court, a judicial impairment of a contract obligation was not within § 10, Article I, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no federal question of which this Court could take jurisdiction on a writ of error from a state court.

It is urged upon us that the impairment here is legislative, in that the case turned on the effect of § 3376 of the Iowa Code; that the subsequent judicial construction of it became part of the statute and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed, before the making of the contract, and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the court

now says it means. The court has power to construe a legislative act, but it has no power by change in construction to date its passage as a law from the time of the later decision. A statute in force when a contract was made can not be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this Court cited in the *Flanagan Case*.

For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial federal question, and dismiss the writ of error for lack of jurisdiction.

Writ of Error Dismissed.

FLEMING ET AL. v. FLEMING.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 175. Argued January 17, 1924.—Decided February 18, 1924.

1. An objection to a decision of a State Supreme Court that it impaired contract rights, in violation of Art. I, § 10, of the Constitution, by overruling former decisions, was first made to that court by a second petition for rehearing, and was denied upon the ground that the prior decisions were not overruled. *Held*, a consideration of the point sufficient as a basis for assigning error here. P. 31.
2. The impairment of contract obligation forbidden by Art. I, § 10, of the Constitution, is impairment by legislation. The proposition that judicial impairment is included has been so frequently denied that it can not support a writ of error to a State Supreme Court. *Id.* *Tidal Oil Co. v. Flanagan*, 263 U. S. 444.